Supreme Court, U.S.

No. 95 132 JUL 24 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

In this case, the majority of the three-judge federal district court, acting on remand from this Court, held that eight of Ohio's 99 state House Districts had been drawn in violation of the Equal Protection Clause of the Fourteenth Amendment. The questions presented on this appeal are:

1. Did the court below violate the terms of this Court's remand, or commit an abuse of discretion, when, following the remand, it granted plaintiffs' motion for leave to file an amended complaint and proceeded to adjudicate the new claim presented in that complaint?

2. Did the district court err in allowing this action to be maintained with respect to those electoral districts in which no plaintiff suffered any cognizable injury?

3. Was the district court's judgment erroneous (a) because it applied an incorrect standard of proof in determining that plaintiffs had made out a *prima facie* case and (b) because plaintiffs could not make out a *prima facie* case under the correct standard of proof?

4. If the district court did not err in holding that plaintiffs had made out a prima facie case requiring strict scrutiny of defendants' actions, did the court err in concluding that the defendants had failed to establish a compelling interest justifying those actions?

5. Did the district court err in considering the question whether defendants' actions violated the Ohio Constitution because (a) consideration of that question was barred by the full faith and credit statute, 28 U.S.C. § 1738, and (b) if consideration was not barred by that statute, the district court should have abstained under the principles laid down by this Court?

LISTING OF ADDITIONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Secretary to the Apportioning Persons.

Appellees

THOMAS E. FERGUSON, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, TYRONE RILEY, RICHARD CORDRAY, PAUL MECHLING, RONALD GERBERRY, Representative of the 65th Ohio House District, MARY ABEL, Representative of the 78th Ohio House District, and WILLIAM MALLORY.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LISTING OF ADDITIONAL PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	8
I. INTRODUCTION	8
II. THE DISTRICT COURT, TO THE SUBSTANTIAL PREJUDICE OF APPELLANTS, EXCEEDED THE SCOPE OF THIS COURT'S REMAND IN *VOINOVICH v. QUILTER*, 113 S.Ct. 1149 (1993), AND OTHERWISE ABUSED ITS DISCRETION BY ALLOWING APPELLEES TO AMEND THEIR COMPLAINT AND BY ADJUDICATING THE CLAIM STATED IN THE AMENDED COMPLAINT	9
III. THE DISTRICT COURT ERRED BY DECLARING FOUR DISTRICTS INVALID BECAUSE THE PLAINTIFFS FAILED TO ESTABLISH THAT ANY OF THEM SUFFERED A COGNIZABLE INJURY UNDER THE FOURTEENTH AMENDMENT WITH REGARD TO THOSE FOUR DISTRICTS	13

TABLE OF CONTENTS—Continued

Page

IV. THE DISTRICT COURT ERRED BY SUBJECTING THE PLAN TO STRICT SCRUTINY BECAUSE (a) THE DISTRICT COURT APPLIED AN INCORRECT STANDARD IN CONCLUDING THAT PLAINTIFFS HAD MADE OUT A PRIMA FACIE CASE, AND (b) THE RECORD DOES NOT PERMIT A FINDING THAT RACE WAS THE "PREDOMINANT MOTIVATING FACTOR" IN DRAFTING THE OHIO PLAN OF APPORTIONMENT 14

V. EVEN IF STRICT SCRUTINY WERE PROPERLY INVOKED, THE DISTRICT COURT ERRED BY RULING THAT THE OHIO APPORTIONMENT BOARD DID NOT HAVE A COMPELLING INTEREST FOR ITS CONSIDERATION OF RACE 21

VI. THE DISTRICT COURT ERRED IN ADDRESSING THE VALIDITY OF AMENDMENT D UNDER STATE LAW BECAUSE (a) CONSIDERATION OF THOSE ISSUES WAS BARRED UNDER 28 U.S.C. § 1738, AND (b) IF CONSIDERATION WAS NOT BARRED, THE DISTRICT COURT SHOULD HAVE ABSTAINED UNDER PRINCIPLES LAID DOWN BY THIS COURT 24

CONCLUSION 29

APPENDIX

A. *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio April 28, 1995) (D. 322, 323) 1a

B. *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio May 9, 1995) (D. 324) 81a

C. *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio May 26, 1995) (D. 327) 82a

TABLE OF CONTENTS—Continued

		Page
D.	*Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio March 31, 1994) (D. 256)	128a
E.	*Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio March 31, 1994) (D. 257)	145a
F.	*Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio May 26, 1995) (D. 325)	153a
G.	*Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio June 23, 1995) (D. 334)	155a
H.	Notice of Appeal (May 26, 1995) (D. 329)	157a
I.	Notice of Appeal (June 23, 1995) (D. 335)	159a
J.	CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED	161a
	Fourteenth Amendment	161a
	28 U.S.C. § 294	163a
	28 U.S.C. § 295	164a
	28 U.S.C. § 296	164a
	28 U.S.C. § 1253	165a
	28 U.S.C. § 1738	165a
	28 U.S.C. § 2284	166a
	Article XI, Ohio Constitution	168a

TABLE OF AUTHORITIES

Cases — Page

Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995) 22
Armour v. Ohio, 775 F. Supp. 1044 (N.D. Ohio 1991) 23, 28
Briggs v. Pennsylvania R. Co., 334 U.S. 304 (1948) 10
Burford v. Sun Oil Co., 319 U.S. 315 (1943) 27
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 22
Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 27
DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd in part, dismissed in part*, 115 S.Ct. —— (1995) 20
Gaines v. Caldwell, 148 U.S. 228 (1893) 10
Growe v. Emison, 113 S.Ct. 1075 (1993) 24, 25, 27, 28
In re Voinovich, 114 S.Ct. 2156 (1994) 6
Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 115 S.Ct. —— (1995) 16
Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983).... 11
Miller v. Johnson, 115 S.Ct. —— (1995) .....*passim*
Prather v. Dayton Power & Light Co., 918 F.2d 1255 (6th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991) 11
Quilter v. Voinovich, 794 F. Supp. 695 (N.D. Ohio Jan. 31, 1992) 2, 3, 7, 19
Quilter v. Voinovich, 794 F. Supp. 756 (N.D. Ohio March 10, 1992) 2, 4
Quilter v. Voinovich, 1992 WL 677145 (N.D. Ohio March 19, 1992) 2
Quilter v. Voinovich, 794 F. Supp. 760 (N.D. Ohio March 31, 1992) 2
Quilter v. Voinovich, 794 F. Supp. 760 (N.D. Ohio May 5, 1992) 2, 4
Quilter v. Voinovich, 857 F. Supp. 579 (N.D. Ohio March 31, 1994) 5, 20
Quilter v. Voinovich, 157 F.R.D. 36 (N.D. Ohio March 31, 1994) 5, 10

TABLE OF AUTHORITIES—Continued

Page

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) 26
Romero v. Coldwell, 455 F.2d 1163 (5th Cir. 1972) 26, 27
Scott v. Germano, 381 U.S. 407 (1965) 26
Shaw v. Barr, 113 S.Ct. 653 (1992) 10
Shaw v. Reno, 113 S.Ct. 2816 (1993) ..... *passim*
Stanton v. Stanton, 429 U.S. 501 (1977) 10
Troxel Mfg. Co. v. Schwinn Bicycle Co., 489 F.2d 968 (6th Cir. 1973), *cert. denied*, 416 U.S. 939 (1974) 11
United States v. Hays, 115 S.Ct. —— (1995) 13-14
Voinovich v. Ferguson, 63 Ohio St.3d 198 (1992) ..... *passim*
Voinovich v. Quilter, 503 U.S. 979 (1992) 5
Voinovich v. Quilter, 113 S.Ct. 1149 (1993) ..... *passim*
Worley v. Columbia Gas of Ky., Inc., 491 F.2d 256 (6th Cir. 1973), *cert. denied*, 417 U.S. 970 (1974) 11
Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 21, 22
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 11

United States Constitution

Fourteenth Amendment ..... *passim*
Fifteenth Amendment 3

Statutes

28 U.S.C. § 294 6
28 U.S.C. § 294(e) 7
28 U.S.C. § 1253 2
28 U.S.C. § 1738 24
28 U.S.C. § 2284 6
42 U.S.C. § 1973 ..... 3, 4, 21, 23

Miscellaneous

Ohio Const., Art. XI ..... *passim*
Ohio Const., Art. XI, § 1 2
Ohio Const., Art. XI, § 3 ..... 17, 20

TABLE OF AUTHORITIES—Continued

	Page
Ohio Const., Art. XI, § 4	20
Ohio Const., Art. XI, § 6	20
Ohio Const., Art. XI, § 7(A)	20
Ohio Const., Art. XI, § 7(C)	20, 28
Ohio Const., Art. XI, § 7(D)	*passim*
Ohio Const., Art. XI, § 10	28
Ohio Const., Art. XI, § 13	26

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Appeal from the United States District Court for the Northern District of Ohio

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The April 28, 1995, Opinion of the three-judge district court has not been officially reported. It is set out in the Appendix hereto at App. 1a.

The May 9, 1995, Order of the three-judge district court has not been officially reported. It is set out in the Appendix hereto at App. 81a.

The May 26, 1995, Opinion of the three-judge district court majority has not been officially reported. It is set out in the Appendix hereto at App. 82a.

The March 31, 1994, Opinions and Orders of the three-judge district court have been officially reported at 857 F. Supp. 579 and 157 F.R.D. 36. They are set out in the Appendix hereto at App. 128a and 145a.

The May 26, 1995, Order Vacating Memorandum Opinion (Docket No. 322) and Vacating Order Regarding Admission of Trial Exhibits (Docket No. 320) of the three-judge district court majority has not been officially reported. It is set out in the Appendix hereto at App. 153a.

The June 23, 1995, Order of Chief Judge Merritt of the United States Court of Appeals for the Sixth Circuit has not been officially reported. It is set out in the Appendix hereto at App. 155a.[1]

JURISDICTION

The Orders appealed from were filed on April 28, 1995, May 9, 1995, and May 26, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of the Fourteenth Amendment to the United States Constitution, 28 U.S.C. §§ 294, 295, 296, 1253, 1738, & 2284, and Article XI of the Ohio Constitution is set out at App. 161a-175a.

STATEMENT OF THE CASE

Pursuant to Article XI, § 1, of the Ohio Constitution, the Ohio Apportionment Board ("Board") convenes every ten years in the year following the decennial census.

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[1] The following are the district court's opinions and orders prior to this Court's decision in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993): (1) *Quilter v. Voinovich*, 794 F.Supp. 695 (N.D.Ohio Jan. 31, 1992); (2) *Quilter v. Voinovich*, 794 F.Supp. 756 (N.D. Ohio March 10, 1992; (3) *Quilter v. Voinovich*, 1992 WL 677145 (N.D.Ohio March 19, 1992); (4) *Quilter v. Voinovich*, 794 F.Supp. 760 (N.D.Ohio March 31, 1992); and (5) *Quilter v. Voinovich*, 794 F.Supp. 760 (N.D.Ohio May 5, 1992).

The 1991 Board [2] convened on August 22, 1991. D. 147, Ex. A. at 1-2. The Board adopted a plan of apportionment for Ohio's General Assembly on October 1, 1991, D. 154, Ex. 16 at 31-32, and amended that plan on October 3, 1991. The plan was labeled "Amendment C." D. 154, Ex. 17 at 9-14.

On November 1, 1991, Plaintiffs-Appellees commenced this action in the district court alleging violations of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution. D. 1. On January 31, 1992, the district court issued its Opinion and Order, declaring that Amendment C violated § 2 of the Voting Rights Act, because the Board had failed to justify the inclusion in the plan of several majority-minority districts. *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992). The district court expressly abstained on the Ohio Constitutional issues, noting that these issues were then pending before the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). 794 F. Supp. at 701-02. The district court remanded Amendment C to the Board with instructions to justify the majority-minority districts included in the plan. Judge Dowd dissented.

On February 14, 1992, the Ohio Supreme Court issued its decision upholding Amendment C against state constitutional attacks. *Voinovich v. Ferguson, supra.*[3] After

[2] The Board consisted of Defendants-Appellants George V. Voinovich, Governor of the State of Ohio, Robert A. Taft II, Secretary of State of Ohio, and Stanley J. Aronoff, President of the Ohio Senate, and Plaintiffs-Appellees Thomas E. Ferguson, Auditor of State of Ohio, and Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives. The Board elected Defendant-Appellant James R. Tilling, who was then the Chief Executive Officer of the Ohio Senate, as its Secretary. Appellees Ferguson and Quilter both left public office in 1995. They remain two of the twenty-one Plaintiffs who commenced this case.

[3] The Ohio Supreme Court rendered its decision only after a stay of its proceedings issued on November 25, 1991, was lifted.

a majority of the members of the Ohio Supreme Court directed the Board to make technical corrections to the plan, 63 Ohio St. 3d at 202, 205, 214, those corrections were made, D. 147, Ex. C at 59; D. 147, Ex. A at 107, and the plan, as amended, was labeled "Amendment D." D. 147, Ex. A at 107.[4] Also, on February 18, 1992, the Board adopted "Findings and Conclusions," which, in the view of a majority of the Board, complied with the district court's order to "justify" the inclusion of majority-minority districts under both Amendment C and Amendment D. D. 147, Ex. A.

On March 10, 1992, the district court ruled that the Board once again had failed to justify the inclusion of five majority-minority house districts and then ruled that Amendment D violated both § 2 of the Voting Rights Act and the Fifteenth Amendment to the United States Constitution. *Quilter v. Voinovich*, 794 F. Supp. 756 (N.D. Ohio 1992). Judge Dowd again dissented.

The stay was issued by a panel of the United States Court of Appeals for the Sixth Circuit consisting of Judges Jones and Peck—two of the three judges sitting on the three-judge district court panel in this case—and Judge Nelson, who dissented. The order imposing the stay was *sua sponte* vacated by the *en banc* Sixth Circuit on December 12, 1991. See *Voinovich v. Ferguson*, 63 Ohio St.3d at 198-99.

[4] In its decisions, the district court referred to Amendment C as "the 1991 plan" and Amendment D as "the 1992 plan." For the most part, Amendment D's technical corrections involved reuniting split political subdivisions. D. 192; *Quilter v. Voinovich*, 794 F.Supp. 760, 763 (N.D. Ohio 1992). As explained by Tilling:

> That is only a result of recombining political subdivisions, and there's no other motivation whatsoever. But it points out, and I think you want to examine these numbers in real detail. It does illustrate what happens when you follow the Ohio Constitution, not the Voting Rights Act.

D. 147, Ex. B at 87. The plan originally proposed by the majority members of the Board contained nine majority-minority districts, while the plan adopted in October, 1991, *i.e.*, Amendment C, contained eight such districts. Amendment D reduced the number of majority-minority districts included in the plan to five.

On March 11, 1992, Appellants appealed the district court's order to this Court, D. 164, which, on April 20, 1992, issued a stay of the district court's orders. *Voinovich v. Quilter*, 503 U.S. 979 (1992). In a supplemental opinion issued on March 19, 1992, the district court majority also concluded that four districts under Amendment D violated the "one person, one vote" requirement of the Fourteenth Amendment to the United States Constitution. D. 173.

On March 2, 1993, this Court reversed the decision of the district court. *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). The Court remanded the case to the district court "*only* for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment." 113 S.Ct. at 1154 (emphasis added).

Despite the limited scope of this Court's remand, Appellees sought the district court's permission to file a second amended complaint attacking the plan as a "racial gerrymander" in violation of the Fourteenth Amendment as discussed by this Court in *Shaw v. Reno*, 113 S.Ct. 2816 (1993). On March 31, 1994, the district court issued two Opinions and Orders. In the first, the three-judge court unanimously ruled "that the Ohio reapportionment plan survives scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause . . . ." *Quilter v. Voinovich*, 857 F. Supp. 579, 587, App. 143a (N.D. Ohio 1994). Thus, the district court resolved the sole issue remanded to it by this Court.

In the second Opinion and Order, however, the district court, in a two-to-one decision, exceeded the scope of this Court's remand by granting Appellees' motion to file a second amended complaint in order to attempt to state a claim under *Shaw v. Reno*. *Quilter v. Voinovich*, 157 F.R.D. 36, App. 145a (N.D. Ohio 1994). Judge Dowd dissented.[5]

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[5] Appellants thereafter petitioned this Court for a writ of mandamus directing the district court to limit itself to the scope

The case was retried to the district court on November 16 & 17, 1994. On April 28, 1995, the district court, again in a two-to-one decision, ruled that eight (8) of ninety-nine (99) Ohio House districts "violate the Equal Protection Clause of the Fourteenth Amendment." *Quilter v. Voinovich*, No. 5:91CV-2219, App. 1a at 38a (N.D. Ohio April 28, 1995). The district court concluded that these eight districts, House Districts ("HD") 21, 22, 30, 31, 38, 39, 44, and 49, had been racially gerrymandered because race was "a substantial and motivating factor" in their creation. App. 34a. The district court ordered Defendants to redraw the eight districts. *Id.*, App. 39a.[6] Again, Judge Dowd dissented. App. 40a. On May 26, 1995, the Defendants noticed their appeal from the district court's April 28, 1995, decision. D. 329, App. 157a.

On May 26, 1995, two of the members of the three-judge district court panel issued an order purporting to vacate their April 28, 1995, decision, App. 153a, and issued an amended decision with significant changes. App. 82a.[7] The most significant modification of the deci-

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of the remand. That petition was denied without opinion on May 31, 1994. *In re Voinovich*, 114 S.Ct. 2156 (1994).

[6] The distirct court repeated the flawed reasoning of its January 31, 1992, decision (which this Court reversed in *Voinovich*): Because African-American voters had been added to districts then represented by African-American legislators, those voters had been "wasted." App. 24a, 39a. The district court reached this conclusion based upon the following minor increases in African-American population in such districts: (1) HD 21, +7.50%; (2) HD 22, +6.18%; (3) HD 30, +2.78%; (4) HD 31, +3.26%; (5) HD 38, +2.30%; (6) HD 39, +4.59%; (7) HD 44, +7.67%; and (8) HD 49, +8.29%. App. 30a-32a. Only one of the eight districts declared invalid is a majority-minority district.

[7] Following this Court's remand in this case, Judge Peck, an original member of the three-judge panel, died. Thereafter, Senior Circuit Judge Celebrezze, without ever having been designated and assigned to this case pursuant to 28 U.S.C. §§ 294 & 2284 by the Chief Judge of the Sixth Circuit, began sitting as a member of the panel in this case. Judge Celebrezze, however, submitted his

sion was the addition of footnote 19, wherein the majority of the district court abandoned its decision to abstain on state constitutional issues, a decision to which the district court had steadfastly adhered since the beginning of this litigation. App. 123a-126a n.19. See *Quilter v. Voinovich*, 794 F. Supp. 695, 702 (N.D. Ohio 1992) (abstaining on Ohio constitutional issues). The district court, searching for a rationale for its invalidation of Amendment D, concluded that Appellants had disregarded

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"resignation as a Senior Judge of the Sixth Circuit Court of Appeals" effective May 1, 1995. D. 333, Exs. F & G. On May 1, 1995, Chief Judge Merritt, in a letter to the members of the district court panel in this case, indicated that, notwithstanding his resignation, Judge Celebrezze was authorized "to act with the panel in connection with the entry of a judgment." D. 333, Ex. B. The vacation of the district court majority's April 28, 1995, decision, and the issuance of a new decision with significant alterations, however, clearly exceeded the scope of this authorization.

Appellants, therefore, moved the district court to vacate the order vacating its April 28, 1995, decision, as well as the May 26, 1995, decision. D. 333. Appellants asserted that Judge Celebrezze, having resigned rather than retired, was not authorized to perform any judicial acts beyond the effective date of his resignation, see 28 U.S.C. § 294(e), and that, in any event, Judge Merritt's May 1, 1995, letter—to the extent it could be considered a designation—did not authorize Judge Celebrezze to perform any judicial acts other than those "in connection with the entry of a judgment." In the alternative, Appellants requested that the district court amend its May 26, 1995, decision so as not to resolve Ohio constitutional issues upon which it had earlier correctly abstained.

The district court has not ruled upon Appellants' motion, but on June 23, 1995, Chief Judge Merritt issued an order purporting to designate and assign Judge Celebrezze as a member of the panel in this case, "*nunc pro tunc* effective May 1, 1995." *Quilter v. Voinovich*, No. 5:91CV-2219, App. 155a (N.D.Ohio June 23, 1995). Because of the uncertain validity of the district court majority's actions on May 26, 1995, and of Judge Merritt's June 23, 1995, order, Appellants have not withdrawn their appeal from the district court's April 28, 1995, decision. This Jurisdictional Statement, therefore, addresses Appellants' appeals from both the April 28 and the May 26, 1995, decisions.

the "traditional districting principle" embodied in Article XI, § 7(D) of the Ohio Constitution, App. 171a, by not retaining districts from the 1981 apportionment. App. 124a n.19.

On June 23, 1995, Appellants noticed their appeal from the district court majority's purported decision of May 26, 1995. D. 335, App. 159a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION.

This case involves several substantial questions concerning the authority of a three-judge district court to act on remand from this Court and a state's authority to reapportion its own legislature without interference from federal courts. Specifically, the district court in this case exceeded the scope of this Court's mandate in *Voinovich v. Quilter*, in which the case was remanded to the district court for consideration of a single issue, by permitting the Plaintiffs-Appellees to amend their complaint on remand and by proceeding to adjudicate the added claim.

In addition, the district court declared eight Ohio House of Representatives districts in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution without any showing that Appellees suffered a legally cognizable injury with respect to at least four of those districts. Appellees lacked standing to maintain an equal protection claim with respect to these four districts.

In adjudicating Appellees' equal protection claim, the district court analyzed Amendment D, Ohio's plan of apportionment, under an incorrect legal standard. The district court ruled that Amendment D was subject to strict scrutiny because race was "*a* substantial and motivating factor" in its drafting. Under the proper standard, Amendment D is not subject to strict scrutiny because race was not "*the* predominant motivating factor" in draft-

ing the plan, *i.e.*, the Board did not subordinate traditional districting principles to its consideraton of race. Furthermore, even if strict scrutiny was required in this case, the district court incorrectly concluded that the Board lacked a compelling interest for its consideration of race in conjunction with traditional, race-neutral districting principles.

Finally, this case involves substantial questions with respect to the full faith and credit that must be given to the Ohio Supreme Court's decision upholding Amendment D on state constitutional grounds. The district court's amended decision of May 26, 1995 (which is of questionable validity given the prior resignation of Judge Celebrezze), not only fails to accord the Ohio Supreme Court's decision the full faith and credit to which it is entitled, but also conflicts with this Court's decisions requiring abstention on state law redistricting issues.

II. THE DISTRICT COURT, TO THE SUBSTANTIAL PREJUDICE OF APPELLANTS, EXCEEDED THE SCOPE OF THIS COURT'S REMAND IN *VOINOVICH v. QUILTER*, 113 S.Ct. 1149 (1993), AND OTHERWISE ABUSED ITS DISCRETION BY ALLOWING APPELLEES TO AMEND THEIR COMPLAINT AND BY ADJUDICATING THE CLAIM STATED IN THE AMENDED COMPLAINT.

The district court exceeded the scope of this Court's remand of this case following the decision in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). This Court expressly remanded the case "*only* for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment." 113 S.Ct. at 1154 (emphasis added). Despite this clear limitation, the district court has, in effect, ignored the mandate of this Court and has once again declared Ohio's General Assembly districts invalid.[8]

[8] In his April 28, 1995, dissent, Judge Dowd agreed with Appellants that allowing Appellees to amend their complaint following

"[A]n inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948). See also *Stanton v. Stanton*, 429 U.S. 501, 502, 504 (1977). The district court simply disregarded this Court's specific limitation upon the scope of its remand in this case for consideration of one issue only, *i.e.*, the equal population issue, which was ultimately resolved in the Appellants' favor.

Instead, the district court attempted to justify its reopening of this case by reasoning that because *Shaw v. Reno* was decided after the Court issued its decision in this case, the Ohio reapportionment plan must be evaluated in light of *Shaw*. *Quilter v. Voinovich*, 157 F.R.D. at 40. App. 150a. It is well established, however, that this Court's mandate is unaffected by its subsequent decisions. *Gaines v. Caldwell*, 148 U.S. 228, 244 (1893).

Indeed, this Court was unquestionably aware of the issue raised in *Shaw v. Reno* when it rendered its first decision in the present case. Nevertheless, this Court did *not* remand this case for consideration of the issue raised in *Shaw*.[9] Rather, the Court remanded this case "*only* for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment." *Voinovich*, 113 S.Ct. at 1154 (emphasis added). This Court did not remand the case to consider *all* potential Fourteenth Amendment claims. It remanded for consideration of one claim, the "equal population [one person, one vote] claim."

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remand, and the subsequent adjudication of the "new" claim, both exceeded the scope of this Court's remand and constituted an abuse of discretion. App. 43a-44a.

[9] This Court noted probable jurisdiction in *Shaw* on December 7, 1992, the day prior to the oral argument in this case. *Shaw v. Barr*, 113 S.Ct. 653 (1992). *Shaw*, the pendency of which was discussed at the oral argument in the present case, Trans. of Oral Arg., No. 91-1618, at 8-9, 17 (Dec. 8, 1992), was itself argued on April 20, 1993.

Moreover, this Court noted in its unanimous opinion in this case that the "*Shaw* issue," *i.e.*, the validity of race-based redistricting under the Fourteenth Amendment, had not heretofore been raised in this case. *Voinovich*, 113 S.Ct. at 1157. Racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment simply was not, and is not, an issue in this case. Consequently, it was entirely inappropriate for the district court to go beyond the scope of this Court's remand by granting Appellees' motion to file a second amended complaint to state a new *Shaw* claim and by proceeding to adjudicate that claim.

Ordinarily, the amendment of pleadings is a matter within the sound discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). An abuse of discretion is manifest when the District Court grants a motion to amend a complaint late in the proceedings. *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1258-59 (6th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). Following trial of the case, " 'a complaint cannot be amended . . . where the amendment raises issues not within the theory on which the case was tried.' " *Worley v. Columbia Gas of Ky., Inc.*, 491 F.2d 256, 265 (6th Cir. 1973), *cert. denied*, 417 U.S. 970 (1974).[10]

In the present case, even in the absence of this Court's mandate, the allowance of an amendment presenting a completely new theory, years after the case began and long after it should have ended, is a clear abuse of discretion in view of the resulting prejudice to Appellants. And in any event, the allowance of the amendment in this case goes beyond a mere abuse of discretion: it constitutes a direct violation of this Court's March 2, 1993, mandate.

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[10] See also, *e.g.*, *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 971 (6th Cir. 1973), *cert. denied*, 416 U.S. 939 (1974); *Lynch v. Dukakis*, 719 F.2d 504, 508-09 (1st Cir. 1983).

In the case at bar, Appellees were given every opportunity to formulate and litigate their claims. This Court addressed each of those claims, and left one, and only one, issue for the district court to decide on remand. The district court, contrary to the mandate of this Court, permitted Appellees on remand to retry this case on a theory completely inconsistent with the theory upon which their case was tried and reviewed by this Court. During the trial and appeal of this action, Appellees did not maintain that Appellants impermissibly took race into account in drawing districts for the Ohio General Assembly. Rather, as noted by this Court, they simply asserted that Appellants *should* have taken race into account towards a different end, because "[i]n appellees' view, the plan should have created a larger number of 'influence' districts—districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice." *Voinovich*, 113 S.Ct. at 1153. See also D. 48 at 30, 99. Appellees' second amended complaint, on the other hand, challenged the very use of race as a factor.

Because the district court exceeded the scope of this Court's remand in *Voinovich*, this Court should summarily reverse the April 28, 1995, and May 26, 1995, decisions of the district court and order the entry judgment for Appellants. Alternatively, the Court should note probable jurisdiction to determine whether the district court abused its discretion by permitting the Appellees to amend their complaint, following the remand in this case, in order to state a claim completely inconsistent with the theories upon which the case was originally tried.

III. THE DISTRICT COURT ERRED BY DECLARING FOUR DISTRICTS INVALID BECAUSE THE PLAINTIFFS FAILED TO ESTABLISH THAT ANY OF THEM SUFFERED A COGNIZABLE INJURY UNDER THE FOURTEENTH AMENDMENT WITH REGARD TO THOSE FOUR DISTRICTS.

As previously noted, this case was commenced by twenty-one Plaintiffs who, in their second amended complaint, asserted that the Ohio plan of apportionment constituted a racial gerrymander in violation of the Fourteenth Amendment.[11] The district court ruled in favor of Appellees and declared eight districts invalid, despite the fact that no plaintiff resides in four of the districts declared invalid, *i.e.*, HD 21, 22, 30, and 38. Because no plaintiff lives in these four districts, Appellees have failed to establish a cognizable injury under the Fourteenth Amendment, and the district court's ruling with regard to these four districts must be reversed.

In *United States v. Hays, supra*, this Court held that nonresidents of allegedly racially gerrymandered districts do not have standing under the Fourteenth Amendment to challenge those districts. 115 S.Ct. at ——. This Court further ruled that residents of districts adjoining those alleged to have been racially gerrymandered do not have standing to attack an apportionment plan simply by alleging that the racial composition of the district in which they reside would have been different if the adjoining district had not been so gerrymandered. Non-

[11] Although Appellees purported to challenge the validity of the entire apportionment plan, they identified only eight districts (HD 21, 22, 30, 31, 38, 39, 44, and 49) which had allegedly "been modified solely on the basis of race . . . ." D. 258 at ¶ 56. The district court concluded that Appellees were entitled to attack the entire plan, but declared only these eight districts in violation of the Fourteenth Amendment. *Cf. United States v. Hays*, 115 S.Ct. ——, —— (1995) ("Appellees insist that they challenged Act 1 in its entirety, not District 4 in isolation. That is true. It is also irrelevant.") (citation omitted).

residents of allegedly racially gerrymandered districts simply have not suffered "a cognizable injury under the Fourteenth Amendment." 115 S.Ct. at ——.[12]

In the case at bar, none of the Appellees reside in HD 21, 22, 30, or 38, four of the districts declared invalid by the Court.[13] Appellees therefore lack standing to challenge the validity of these districts. Accordingly, this Court must reverse the district court's ruling with respect to these four districts.

IV. THE DISTRICT COURT ERRED BY SUBJECTING THE PLAN TO STRICT SCRUTINY BECAUSE (a) THE DISTRICT COURT APPLIED AN INCORRECT STANDARD IN CONCLUDING THAT PLAINTIFFS HAD MADE OUT A PRIMA FACIE CASE, AND (b) THE RECORD DOES NOT PERMIT A FINDING THAT RACE WAS THE "PREDOMINANT MOTIVATING FACTOR" IN DRAFTING THE OHIO PLAN OF APPORTIONMENT.

In *Shaw v. Reno, supra*, this Court concluded that plaintiffs challenging a redistricting scheme may state "a claim under the Equal Protection Clause by alleging that the [state] adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." 113 S.Ct. at 2832. In *Miller v. Johnson*,

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[12] Appellants raised the issue of standing before the district court, see D. 226 at ¶ 6, and in any event, this Court ruled in *Hays* that "[t]he question of standing is not subject to waiver . . .: 'we are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. * * *'" *Hays*, 115 S.Ct. at —— (citation omitted).

[13] Although Appellees make no factual allegations in their complaint with respect to districts in which each Plaintiff resides, Appellants acknowledge that at least one Plaintiff resides in HD 31, 39, 44, and 49. The addresses on the second amended complaint and the intervenors' complaint, however, reveal that no Plaintiffs reside in HD 21, 22, 30, or 38. D. 16; D. 258.

115 S.Ct. —— (1995), the Court held that "bizarreness" was not "a threshold showing" required to state a claim under *Shaw*. *Miller*, 115 S.Ct. at ——. But the Court went on to say that the good faith of the state in redistricting must be presumed in the absence of a sufficient showing to the contrary:

> The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter into a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race *predominates* in the redistricting process. * * * The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that *race was the predominant factor motivating the legislature's decision* to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature *subordinated traditional race-neutral districting principles*, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."

Miller, 115 S.Ct. at —— (citations omitted) (emphasis added).[14]

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[14] In her concurring opinion, Justice O'Connor stated:

> I understand the threshold standard the Court adopts—"that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,"—to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices. Those practices provide a crucial frame of reference and therefore con-

During the retrial of this case, Appellants urged the district court to analyze Amendment D under the very standard set forth by the district court in *Johnson v. Miller*, 864 F.Supp. 1354 (S.D.Ga. 1994), and affirmed by this Court in *Miller*. The district court, however, expressly rejected *Johnson*'s "predominant motivating factor" standard as the "trigger" for strict scrutiny. App. 15a-16a; App. 97a-98a. Instead, it adopted a much lower " 'race-a-motivating-factor' triggering test," App. 16a; App. 98a, which it noted would "theoretically subject all redistricting plans that exhibit racial intent to strict scrutiny analysis, including plans that are drawn with the racial purpose of complying with the Voting Rights Act . . . ." *Id.* The district court's decision in this case is thus directly contrary to this Court's decision in *Miller*. This error in itself warrants reversal of the district court's judgment.

Moreover, Amendment D unquestionably survives Appellees' challenge when analyzed under the "predominant motivating factor" standard adopted by this Court in *Miller*. The district court herein found that "none of these [eight] districts presents a bizarre shape . . . ." App. 34a; App. 117a. Indeed, in its April 28, 1995, decision, the district court did not find that the Defendants had disregarded or subordinated *any* "traditional districting principle" in favor of race-based districting. Only as an afterthought, in a footnote added to its May 26, 1995, decision in apparent response to Judge Dowd's dissenting

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> stitute a significant governing principle in cases of this kind. * * *
>
> Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may have well been considered in the redistricting process.

Miller, 115 S.Ct. at —— (O'Connor, J., concurring) (citations omitted).

opinion, did the district court majority conclude that the Board had disregarded one "traditional districting principle" because it purportedly violated Article XI, § 7(D) of the Ohio Constitution, which requires the retention of prior district boundaries when reasonably possible. This belated "finding" not only lacks any support in the record, but should in any event not have been made by the district court. See Part VI, *infra*.

The district court noted that 44 of 99 prior house districts were "available for retention," *i.e.*, fell within the population requirements of Article XI, § 3. The district court then concluded that because Appellees had presented an alternative plan retaining 31 of these districts, while Amendment D retained only seven, Appellants had violated § 7(D). The district court's hastily constructed and superficial analysis cannot be permitted to stand.

First, the asserted violation of § 7(D) cannot rationally be linked to alleged race-based districting. Only four of the allegedly racially gerrymandered districts were "available for retention" from the prior reapportionment.[15] Thus, Appellants' failure to retain prior districts does not support the district court's conclusion that Appellants engaged in racial gerrymandering.

Second, the uncontradicted evidence established that Appellees' so-called "7D plan" retained prior districts *at the expense of violating other provisions of the Ohio Constitution*. Appellant Tilling identified no fewer than twenty-two violations of other provisions of Article XI. D. 313 at 41-43. Tilling further testified that districts must be constructed from ward and precinct boundaries, and because ward and precinct boundaries in every urban

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[15] Under the 1990 census, the populations of 1981 HD 29, 37, 42, and 45, which correspond to HD 22, 39, 44, and 49 under Amendment D, fell within the requirements of Article XI, § 3. The populations of 1981 HD 23, 30, 31, and 38, which correspond to HD 31, 30, 21, and 38 under Amendment D, did not. D. 147, Ex. A at 15-16.

county had significantly changed since the 1981 apportionment, it was virtually impossible to retain any of the prior districts in the urban counties. D. 312 at 231-32.[16]

Finally, the Ohio Supreme Court, "in its independent review of the plan," *Voinovich*, 113 S.Ct. at 1154, specifically found "*the plan* to be constitutional." *Voinovich v. Ferguson*, 63 Ohio St.3d at 200 (emphasis added). Thus, the district court's conclusion that Appellants violated § 7(D) is wholly unfounded.[17]

Indeed, the district court cites to only two items as "direct evidence" of racial gerrymandering: (1) Tilling's handwritten notes recorded at the time he made his first draft of an apportionment plan, and (2) the Board's Findings and Conclusions adopted following the district court's January 31, 1992, decision ordering the Board to "justify" Amendment C. Neither of these items supports the district court's conclusion.

As to Tilling's notes, he testified at trial that the plan described in those notes was not the plan of apportionment now in effect for Ohio's General Assembly. D. 312 at 335. That plan was never adopted by the Board and

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[16] At trial, Appellees called only one witness, Gordon Henderson, who acknowledged that he did not draft Appellees' "7D plan," and that he had not reviewed that plan to determine whether it violated other provisions of the Ohio Constitution. D. 311 at 113-14. Henderson further admitted that to retain prior districts, one would have to consider ward and precinct boundary changes since 1980, but that he did no analysis of such changes. D. 311 at 129.

[17] In *Voinovich v. Ferguson*, the Ohio Supreme Court held that when provisions of Article XI are in conflict, "those public officials designated to apportion the state by Section 1 of Article XI have the duty to choose the proper course, and this court will not order them to correct one constitutional violation by committing another." 63 Ohio St.3d at 200. Thus, even assuming that § 7(D) was violated, the court below erred by usurping the Board's authority and responsibility to apply the various provisions of Article XI when in conflict.

was never in effect for any election. As established by the transcripts of the Apportionment Board meetings, the "model" plan first submitted by Tilling on September 26, 1991, was modified on numerous occasions.[18] Amendment D is the only plan that has ever been effective for an election in Ohio. Thus, the handwritten notes are completely irrelevant.

As to the Board's Findings and Conclusions adopted on February 18, 1992, D. 147, Ex. A, they were adopted by the Board only after it was ordered by the district court to "justify" its inclusion of majority-minority districts in Amendment C on January 31, 1992. *Quilter v. Voinovich*, 794 F.Supp. at 701-02. Accordingly, those findings and conclusions merely constitute a *post hoc* rationalization for the plan eventually adopted. They do not support a finding that traditional districting principles were subordinated to the Board's consideration of race. Rather, when considered as a whole, they establish the Board's belief that its plan complied with *both* the traditional districting principles embodied in Article XI of the Ohio Constitution and the requirements of federal law. See *Voinovich*, 113 S.Ct. at 1158. Thus, it is plain that race was *not* the predominant factor in the Board's reapportionment.

Amendment D stands in stark contrast to the Eleventh Georgia Congressional District invalidated by this Court in *Miller*. Unlike the 11th District in *Miller*, each of the eight districts declared invalid by the district court herein

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[18] The plan described in Tilling's notes was modified: (1) at the September 30, 1991, Board meeting, D. 154, Ex. 15 at 107-18, (2) at the October 1, 1991, Board meeting (to incorporate the districts in Cuyahoga County agreed to by the Black Elected Democrats of Ohio, the Black Elected Democrats of Cleveland, Ohio, and the NAACP), D. 154, Ex. 16 at 29-32, (3) at the October 3, 1991 Board meeting when Amendment C was adopted, D. 154, Ex. 17 at 9-15, and (4) at the February 18, 1992 Board meeting, when Amendment D was adopted. D. 147, Ex. C.

is wholly located within a county. In fact, no district with a significant black population crosses a county boundary.

Moreover, every Ohio house district fully complies with the provisions of Article XI of the Ohio Constitution. They are compact and contiguous, see Article XI, § 7(A), App. 170a; they are created using the boundaries of political subdivisions and wards, see Article XI, § 6, App. 170a; they comply with the population requirements of the Ohio and United States Constitutions, see Article XI, §§ 3 & 4, App. 169a; and not more than one political subdivision is divided between two districts, see Article XI, § 7(C), App. 171a. See *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992); *Quilter v. Voinovich*, 857 F.Supp. 579 (N.D.Ohio 1994). The district court made no finding to the contrary, and indeed found that none of the districts is bizarre in shape. App. 34a; App. 117a. Furthermore, the district court found that "[t]he Apportionment Board instructed Tilling to 'draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act,' and Tilling attempted to comply. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act." App. 28a (citations omitted); App. 111a (citations omitted).[19]

Finally, it must be stressed that unlike the Georgia General Assembly, the Ohio Apportionment Board did not seek to create majority-minority districts "wherever possible." Indeed, as demonstrated by the plan described

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[19] In this respect, Amendment D is much like the California redistricting plan upheld in *DeWitt v. Wilson*, 856 F.Supp. 1049 (E.D.Cal. 1994), and affirmed by this Court on June 29, 1995. *DeWitt v. Wilson*, 115 S.Ct. —— (1995). In that case, the district court concluded "that in the context of redistricting, where race is considered only in applying traditional districting principles along with the requirements of the Voting Rights Act, . . . strict scrutiny is not required." 856 F.Supp. at 1415.

in Tilling's handwritten notes, it was possible to create nine majority-minority house districts. Yet Amendment D, the only plan at issue ever in effect for Ohio, contained only five majority-minority districts. And only one of the eight districts declared invalid by the district court majority herein is a majority-minority district.

From the foregoing, it is clear that race was not the predominant motivating factor used by the Board in drafting Amendment D. Thus, not only did the court below apply an incorrect standard, it could not have found that Appellees had made out a *prima facie* case under the correct standard.

V. EVEN IF STRICT SCRUTINY WERE PROPERLY INVOKED, THE DISTRICT COURT ERRED BY RULING THAT THE OHIO APPORTIONMENT BOARD DID NOT HAVE A COMPELLING INTEREST FOR ITS CONSIDERATION OF RACE.

Appellants maintain that because race was not the predominant motivating factor in drafting Amendment D, the district court improperly subjected the plan to strict scrutiny analysis. Even if this Court concludes, however, that Amendment D is subject to strict scrutiny, this Court should reverse the decision of the district court because it incorrectly applied such analysis. Specifically, the district court incorrectly ruled that the Board did not have a compelling interest in complying with § 2 of the Voting Rights Act simply because Appellees have proven, in this judicial proceeding, that racial bloc voting does not exist in Ohio.[20] This holding misapplies the standard this Court established in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), and its progeny.

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[20] In *Miller*, this Court declined to decide "[w]hether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination . . . ." 115 S.Ct. at ——.

In *Wygant*, this Court ruled that state and local governments' racial classifications must be analyzed under "strict scrutiny," *i.e.*, justified by a "compelling governmental interest" and "narrowly tailored" to the achievement of that interest. 476 U.S. at 274. See also *City of Richmond v. J.A. Crosson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995). In the context of voting rights, this Court has held that "States certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." *Shaw*, 113 S.Ct. at 2380. See also *Miller*, 115 S.Ct. at — ("[W]e insist on a strong basis in evidence of the harm being remedied.").

In the case at bar, the district court simply concluded that because Appellees, in the course of this litigation, have now proven that racial bloc voting does not exist in Ohio, Appellants could not have reasonably believed that consideration of race in the districting process was necessary. App. 35a-37a; App. 119a-122a. The district court prefaced this finding with the statement, "we are not saying that the Apportionment Board could not take race into account unless and until it had been proven in a court that a violation of section 2 of the Voting Rights Act had occurred." App. 36a; App. 120a. But the district court's reliance on Henderson's testimony—which was not presented to the Board until the first trial in this case—to establish the lack of racial bloc voting belies this statement. By relying on its earlier finding of no racial bloc voting, the district court has in effect once again shifted the burden of proving a § 2 violation to the Board. In *Voinovich*, this Court expressly rejected the district court's imposition of such a burden on the Board. 113 S.Ct. at 1156.

Contrary to the district court's holding, the Board, at the time it adopted Amendment D, could reasonably have

concluded that consideration of race, in conjunction with traditional districting principles, was necessary.

First, the Board was threatened with suit under § 2 of the Voting Rights Act unless it acted so as not to dilute minority voting strength. The present lawsuit itself, in which Appellees originally sought the creation of more "influence districts," is proof that such threats were very real. *Voinovich*, 113 S.Ct. at 1153.

Second, the Board was also acutely aware of the other lawsuits that had been filed around the state alleging violations of § 2 of the Voting Rights Act. Indeed, one of those cases, *Armour v. Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991), was decided by a three-judge district court (Judges Jones, Peck, and Batchelder (dissenting)) just one month prior to the adoption of Amendment C in this case. In *Armour*, the district court determined that the 1981 apportionment violated § 2 because it diluted minority voting strength by splitting a community of African-Americans in Mahoning County (Youngstown).

Third, Tilling found a sufficient basis to conclude that minority populations in Ohio were sufficiently large and geographically compact to constitute a majority in approximately nine Ohio House districts, D. 123 at 63-76, that these minorities (African-Americans) were politically cohesive, D. 123 at 66-73, and that racial bloc voting existed throughout Ohio. D. 102 at 30, 162-63; D. 123 at 64-76, 93.

This Court ultimately concluded that this body of evidence was insufficient for Appellees to prove a violation of § 2 of the Voting Rights Act in this case. *Voinovich v. Quilter*, 113 S.Ct. at 1157-58. The evidence, however, was more than sufficient for the Board reasonably to believe that a § 2 plaintiff could establish a *prima facie* case of vote dilution, and the Board, therefore, had a sufficient basis for considering race in conjunction with other traditional districting principles.

VI. THE DISTRICT COURT ERRED IN ADDRESSING THE VALIDITY OF AMENDMENT D UNDER STATE LAW BECAUSE (a) CONSIDERATION OF THOSE ISSUES WAS BARRED UNDER 28 U.S.C. § 1738, AND (b) IF CONSIDERATION WAS NOT BARRED, THE DISTRICT COURT SHOULD HAVE ABSTAINED UNDER PRINCIPLES LAID DOWN BY THIS COURT.

In the district court majority's May 26, 1995, decision, the validity of which is in doubt, see n.7, *supra*, the district court abandoned its January 31, 1992, decision to abstain on state constitutional issues in this case. The majority did so by adding footnote 19 to its opinion in which it found that the Board had violated Article XI, § 7(D) of the Ohio Constitution by not retaining more districts from the prior apportionment. App. 124a-125a n.19. In doing so, the district court both failed to give full faith and credit to the Ohio Supreme Court's decision in *Voinovich v. Ferguson, supra,* as required by 28 U.S.C. § 1738, and violated this Court's decisions requiring abstention on state law issues relating to redistricting.

In *Growe v. Emison,* 113 S.Ct. 1075, 1082 (1993), this Court ruled that federal courts must give full faith and credit to state court decisions on redistricting:

> At the very least, the elementary principles of federalism and comity embodied in the full faith and credit statute, 28 U.S.C. § 1738, obligated the federal court to give that [state court] judgment *legal effect*, rather than treating it simply as one of several competing legislative redistricting proposals available for the district court's choosing.

113 S.Ct. at 1082 (emphasis in original) (citations omitted).

The Ohio Constitutional issue, *i.e.,* Amendment D's compliance with Article XI, § 7(D), was presented to the Ohio Supreme Court during its independent review of the apportionment plan. *Voinovich v. Ferguson,* 63 Ohio

St.3d 198 (1992). Appellees had an opportunity to make their Ohio Constitutional arguments to the Ohio Supreme Court and did so by fully briefing these issues, including the alleged violation of § 7(D), in that case. Indeed, they urged that court not to approve the plan of apportionment because of numerous Ohio Constitutional violations.

The Ohio Supreme Court approved the plan and ordered the technical amendments which became Amendment D. The district court herein was "obligated . . . to give that judgment *legal effect* . . . ." *Growe*, 113 S.Ct. at 1082 (emphasis in origial). Under the full faith and credit statute, the decision of the Ohio Supreme Court is final and binding on the state constitutional issues.

At the end of its May 26, 1995, footnote 19, the district court merely stated that its resolution of Ohio Constitutional issues was "not legally precluded" by the Ohio Supreme Court's decision because that decision only upheld "the constitutionality of Senate District 32 in the redistricting plan." App. 125a-126a n.19. This conclusion is erroneous.

First, the Ohio Supreme Court specifically found "*the plan* to be constitutional." *Voinovich v. Ferguson*, 63 Ohio St.3d at 200 (emphasis added). Consequently, the district court incorrectly concluded that the Ohio Supreme Court reviewed only one district within the plan of apportionment.

Second, as Justice Douglas stated in his opinion in the Ohio Supreme Court:

> At least six justices of this court have now found, for varying reasons, that we have jurisdiction over the subject matter and the parties in this case. Each of the parties has had an opportunity to present to the court any claim a party might have. We have now made a final decision. Parties and their privies

> are bound by that decision and it is not reviewable except by the United States Supreme Court.

Voinovich v. Ferguson, 63 Ohio St.3d at 209-210 (Douglas, J., concurring).

Moreover, if consideration of these state law issues is not barred under the full faith and credit statute, the court below should have abstained on these issues in favor of the Ohio Supreme Court. The fact that litigation in the Ohio Supreme Court concerning reapportionment has now concluded does not alter the requirement that the district court abstain from resolving state constitutional issues. "The existence or not of a pending state judicial proceeding is not determinative" of whether abstention is required under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). See *Romero v. Coldwell*, 455 F.2d 1163, 1167 (5th Cir. 1972). Rather, as noted by this Court in *Pullman Co.*, the *availability* of state court resolution of important state issues will control whether abstention is appropriate. *Pullman Co.*, 312 U.S. at 501.

Article XI, § 13 of the Ohio Constitution provides, in pertinent part, that "[t]he supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article." Thus, if any Ohio Constitutional claims have not been resolved, and if litigation of those claims is not barred as a result of *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992), Appellees should be required to file an action in the Ohio Supreme Court challenging Amendment D's compliance with Article XI of the Ohio Constitution. See *Scott v. Germano*, 381 U.S. 407, 409 (1965) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.").

"Decision of unsettled state law by the state courts in the first instance is especially desirable where the questions of state law are enmeshed with federal questions."

Romero, 455 F.2d at 1166. Such is the case at bar. The district court, in footnote 19 added to its May 26, 1995, decision, indicated that its finding of a Fourteenth Amendment violation under *Shaw v. Reno* was based, in part, upon its (unfounded) belief that Appellants ignored the "traditional districting principle" embodied in § 7(D). If federal issues in this case are dependent on resolution of questions of state law, abstention on these state law issues is particularly necessary. Accordingly, the district court erred by abandoning its long-standing decision to abstain on state constitutional issues in this case.[21]

Furthermore, by reopening Ohio Constitutional issues, the district court impermissibly encroached upon the Board's authority to reapportion the Ohio General Assembly. In *Growe v. Emison, supra*, this Court:

> renew[ed] [its] adherence to the principles expressed in *Germano*, which derive from the recognition that the Constitution leaves the States with the primary responsibility for apportionment of their federal congressional and state legislative districts. "We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."

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[21] Abstention is also appropriate under this Court's decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), this Court, in reviewing the various abstention doctrines, characterized *Burford* abstention as being "appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the case then at bar." 424 U.S. at 814. The necessary interpretation of the various sections of Article XI of the Ohio Constitution, including § 7(D), involved in this matter are "difficult questions of state law." They are of the highest public importance within the State of Ohio and transcend the particular interests of the litigants herein. The entire electorate of the State of Ohio and all its elected representatives are potentially affected.

Growe, 113 S.Ct. at 1081 (citation omitted). Thus, the Court concluded that "federal judges [are required] to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." *Growe*, 113 S.Ct. at 1080. In amending its opinion to add footnote 19, the district court not only ignored the Ohio Supreme Court's decision, but also ignored the admonitions of this Court in *Growe*.

Furthermore, even were this Court to determine that any Ohio Constitutional issues were properly before the district court, that court erroneously held that Appellants violated § 7(D), *i.e.*, that Appellants were required to retain 31 districts from the 1981 apportionment, even where to do so would result in the splitting of numerous political subdivisions in violation of § 7(C). As the Ohio Supreme Court in *Voinovich v. Ferguson* noted, it is the Board's duty to exercise its discretion when two provisions of Article XI conflict. *Voinovich v. Ferguson*, 63 Ohio St.3d at 200 (emphasis added); see n.17, *supra*. The district court's footnote 19 usurped that authority when it concluded that: (1) § 7(D) controlled over § 10 regarding the creation of house districts, and (2) § 7(D) controlled over § 7(C)'s requirement that political subdivisions not be split (and if splitting is required to meet population requirements, only one political subdivision can be split). The Board considered these very arguments made by Appellees on February 18, 1992, and chose to adopt Amendment D under which, unlike the "7D plan," the splitting of political subdivisions was kept to a minimum. D. 313 at 41-43. See *Armour v. Ohio*, 775 F.Supp. at 1058.

Under Ohio law, the relevant choice is clearly committed to the sound discretion of the Board. The Board's lawful exercise of that discretion should not have been upset by the district court or any other court.

CONCLUSION

For the foregoing reasons, this Court should either:

(a) summarily reverse the judgment below and remand for entry of judgment in Appellants' favor in accordance with the court's opinion and mandate in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993); or

(b) note probable jurisdiction and reverse the decision of the district court.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed April 28, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5: 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

Judge Nathaniel R. Jones
Judge Anthony J. Celebreeze, Sr.
Judge David D. Dowd, Jr.

OPINION

The question before this court is whether the Ohio Apportionment Board's consideration of race in its 1992 redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. We hold that by virtue of demonstrated white and African American coalitional voting for legislative seats in Ohio, and the failure of Defendants to demonstrate a compelling state interest in using race in drawing legislative lines, certain districts in the 1992 plan are unconstitutional.

I. Background and Procedural History

Pursuant to the Ohio Constitution, the State Apportionment Board, comprised of five members, must reapportion State House and Senate electoral districts for the state legislature every ten years.[1] Following the 1990 federal census, a majority of the Apportionment Board [2] appointed James R. Tilling to draft an apportionment plan on behalf of the Board. After conducting public hearings throughout the state, including meeting with some members of minority organizations, Tilling drafted a plan that included eight majority-minority districts, districts in which a majority of the population is a member of a specific minority group. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1153 (1993). On October 1, 1991, the Apportionment Board adopted the plan Tilling submitted by a 3-2 vote along party lines. *Id.* The three Republi-

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[1] Article XI, Section 1 of the Constitution of the State of Ohio provides:

> The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.
>
> Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year [1971] and every tenth year thereafter.

Ohio Const., art. XI, § 1.

[2] The majority consisted of Defendants George V. Voinovich, Governor of the State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Robert A. Taft, II, Secretary of State of Ohio. In the minority were Plaintiffs Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, and Thomas E. Ferguson, Auditor of the State of Ohio.

can members voted for the plan, and the two Democrats voted against it. The Board later reconvened on October 3, 1991, to make several technical amendments to the plan, and the plan, adopted on October 3, 1991, in the wake of these changes, was designated "Amendment C."

On November 1, 1991, Barney Quilter and Thomas Ferguson, the two Democrats on the Board who voted against the plan, and various Democratic party officials and legislators filed suit against the Republican members of the Apportionment Board and Tilling. Seeking invalidation of the plan, the Plaintiffs alleged that the redistricting plan violated section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution, which provided specific apportionment guidelines. *Voinovich v. Quilter*, 794 F. Supp. 695, 695-96 (N.D. Ohio 1992). According to the Plaintiffs, the Defendants intentionally "packed minorities into certain districts where minorities historically were able to elect representatives of choice with crossover votes." *Id.* at 698. The Plaintiffs contended that this packing resulted in a waste of minority votes in the packed districts and a dilution of minority voting strength in the surrounding areas where the "packed" voters could influence elections. *Id.* In response, the Defendants contended that the plan actually enhanced the strength of black voters by creating safe, minority-dominated districts. As justification for these changes, the Defendants cited compliance with the Voting Rights Act and federal case law, which allegedly mandated the drawing of majority-minority districts. *Id.*

On January 31, 1992, a majority of this three judge panel held that there was "no legal mandate or finding of a Voting Rights Act violation to justify Defendants' creation of majority minority districts wherever possible in the 1991 apportionment plan." *Id.* at 701. Thus, we

ordered the Board to draft a new plan or demonstrate that it was remedying a section 2 violation.[3] *Id.* at 702.

The Apportionment Board responded by establishing and adopting a record on February 18, 1992, that, in its view, justified the Board's creation of minority-controlled state legislative districts. Furthermore at its February 18 meeting, the Board amended the 1991 plan to eliminate a series of technical errors in the plan that the Ohio Supreme Court had identified in its separate review of the plan, *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992). The resulting 1992 plan, "Amendment D," created only five majority-minority districts, however, a reduction from the eight majority-minority districts in the 1991 plan, "Amendment C."

On March 10, 1992, after the Board submitted its findings and conclusions, along with the new 1992 plan, this court held that the Board "fail[ed] once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992). Furthermore, this court held that the 1992 plan also violated the Fifteenth Amendment of the United States Constitution. *Id.* Nine days later, in response to Defendants' motion for a stay of the March 10 order pending appeal to the United States Supreme Court, this court additionally held that both the 1991 and 1992 plans violated the Fourteenth Amendment because they departed from the requirement that all districts be of nearly equal population. *Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 677145, at *10 (N.D. Ohio Mar. 19, 1992).

The Defendants appealed to the United States Supreme Court. In *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993),

[3] We declined to address the Plaintiffs' constitutional claims at this point because our analysis under the Voting Rights Act required the plan to be justified or revised. Likewise, because the Ohio Supreme Court, in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992), was concurrently considering the Plaintiffs' claim under the Ohio Constitution, we abstained from addressing the pendant claim.

the Supreme Court reversed this court's *Quilter* decisions. Denying two of the Plaintiffs' claims, the Court held that the reapportionment plan at issue did not violate section 2 of the Voting Rights Act, nor did it violate the Fifteenth Amendment to the United States Constitution. Nevertheless, the Court held that the Plaintiffs had established a *prima facie* case that the population deviations between the districts violated the Equal Protection Clause, and the Court remanded "only for further proceedings on whether the plan's deviation from equal population among districts violate[d] the Fourteenth Amendment." *Id.* at 1154.

Upon remand, we held that the Ohio reapportionment plan survived scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the Defendants advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts, (2) their plan reasonably furthered the rational state policy, and (3) the 13.81% and 10.54% total deviations fell within constitutional limits. *Quilter v. Voinovich*, 857 F. Supp. 579, 587 (N.D. Ohio 1994). Accordingly, judgment was entered for the Defendants on this issue.

While the latter decision was pending, however, the Plaintiffs moved this court for permission to amend their complaint in light of the Supreme Court's recent decision in *Shaw v. Reno*, 113 S. Ct. 2816 (1993). As a lower court, we are bound of course, regardless of the strength of our reservations,[4] to follow the Supreme Court's decision in *Reno*, where the Court held for the first time that a plaintiff could state a claim under the Equal Protection Clause by alleging that a districting plan, "though race-

[4] We note that critics of the Court's decision in *Shaw* have raised compelling concerns with which we sympathize. *See* A. Leon Higginbotham, Jr., *et al.*, *Shaw v. Reno, A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Review 1593 (1994); Brief of the Congressional Black Caucus as *Amicus Curiae* in Support of Appellants, *United States v. Hays*, Nos. 94-558/627 (U.S., *cert. granted* Dec. 12, 1995).

neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 2828. We granted the Plaintiffs' motion, and their complaint was accordingly amended.[5] *Quilter v. Voinovich*, 157 F.R.D. 36, 40 (N.D. Ohio 1994).

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[5] The Plaintiffs' Second Amended Complaint revised the First Amended Complaint in only two respects. First, Count IV, entitled "Violation of the Equal Protection Clause—Segregation of Voters by Race Without Compelling Governmental Justification," is added. Second, the prayer for relief was accordingly revised. In pertinent part, Count IV alleges the following:

> 52. . . . The reapportionment plan adopted by the Defendants on February 18, 1992 intentionally separated Ohio voters on the basis of race without regard for the traditional redistricting principles set forth in the Ohio Constitution and otherwise without any compelling governmental justification. To justify the creation of race-based districts in the urban centers of Ohio, Defendants asserted that there was widespread racial bloc voting throughout Ohio. The trial court specifically found, and the Supreme Court of the United States confirmed, that Ohio did not suffer from legally cognizable racially polarized voting. . . .
>
> 53. The Defendants deliberately created race-based legislative districts in urban centers initially and then used the purported, but sham, necessity of creating such districts as the basis for ignoring the traditional anti-gerrymandering provisions of the Ohio Constitution throughout the state of Ohio. Absent the ripple effect of the racial gerrymandering in the urban centers of the state of Ohio, the Defendants would not have been forced to ignore on a wholesale basis the directives of Article XI, Section 7, of the Ohio Constitution to follow existing political and legislative boundaries wherever possible.
>
> 54. . . . The decision to abandon the traditional districting mandates contained within the Ohio Constitution is neither compelled by the doctrine of federal supremacy, nor based on any lawful, organized, or rational districting criteria. . . .
>
> 55. The Defendants have articulated no compelling governmental interest for the wholesale abandonment of the provisions of the Ohio Constitution. As a result, the Defendants have drawn irregular districts in numerous places throughout

Having considered the record evidence and the arguments of the parties, both written and oral, we are prepared to issue our decision.[6] We preface our findings of fact and conclusions of law, however, with a discussion of the governing law that provides the analytical paradigm for our conclusions.

II. First Principles

A. *Nature of a* Shaw v. Reno *Claim*

Prior to the Supreme Court's decision in *Reno*, the Court had delineated only two legal theories to support a redistricting challenge under the Equal Protection Clause of the Fourteenth Amendment: (1) violation of the "one-person-one-vote" principle, which requires that districts be equal in population so that the votes cast by voters in one district do not have less weight than those cast by voters in other districts, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); and (2) a claim of vote dilution, whereby districts are purposefully drawn to unfairly dilute or diminish the voting strength of an identified group of voters, *Rodgers v. Lodge*, 458 U.S. 613 (1982). *Shaw v. Hunt*, 861 F. Supp. 408, 421 (E.D.N.C. 1994), *petition for*

> the state, districts which have no explanation other than the ripple effects caused by the racially drawn districts in the urban centers. In some instances, the racially drawn districts themselves have irregular shapes not required by the Ohio Constitution.
>
> 56. The districts which have been modified solely on the basis of race include House Districts 31, 30, 22, 21, 38, 39, 44, and 49. No evidence has been presented to the trial court that either legally cognizable remedial action was necessary to draw these racially gerrymandered districts, or that the creation of such districts was narrowly tailored to further any compelling governmental need.

Plas.' Second Am. Compl. ¶¶ 52-56.

[6] The court also appreciated and considered an *amicus* brief submitted by the United States Department of Justice, which supported the position of the Defendants.

cert. filed, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (No. 94-923); *see also Reno*, 113 S. Ct. at 2822, 2823, 2828. Under both theories, the Court found that redistricting schemes violated the Equal Protection Clause of the Fourteenth Amendment only when they caused *material harm* to the voting strength of an identifiable group of citizens. *Hunt*, 861 F. Supp. at 422; *see, e.g., Rodgers v. Lodge*, 458 U.S. 613, 616-17 (1982) (noting that redistricting plan violates Fourteenth Amendment when it is adopted with a discriminatory *purpose* and has *effect* of diluting minority voting strength). The Supreme Court had never held that a plaintiff could challenge a redistricting plan solely because it impermissibly took race into account in drawing district lines; the Court had required not only a showing of discriminatory purpose but also specific discriminatory effect, a concrete material harm, to state a valid claim under the Fourteenth Amendment.

In *Shaw v. Reno*, however, the Court announced a third means to challenge legislative redistricting under the Equal Protection Clause. The Court held that "a plaintiff challenging a reapportionment [plan] under the Equal Protection Clause may state a claim by alleging that the [plan], though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 113 S. Ct. at 2828. In essence, the Court was saying that a plaintiff no longer had to allege discriminatory effect or material harm in conjunction with discriminatory purpose to state a valid equal protection claim, if the redistricting plan contained districts, whose composition rationally could be understood only as a deliberate effort to segregate voters on the basis of race—a racial gerrymander, *id.* at 2823 (defining a racial gerrymander as the deliberate and arbitrary distortion of district boundaries for racial purposes).

The Court declared that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' " *Id.* at 2824 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), and they "may serve to stimulate our society's latent race-consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs," *United Jewish Organizations v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part).

Because a racial gerrymander is just as invidious as any other law that classifies people on the basis of their race, the Court in *Reno* held that race-based redistricting demands the same level of scrutiny, that is, strict scrutiny: a race-based redistricting plan can be upheld only if it is narrowly tailored to further a compelling state interest. 113 S. Ct. at 2825, 2826, 2830; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that strict scrutiny applies not only to legislation that contains explicit racial classifications but also to those "rare" statutes that are "unexplainable on grounds other than race," even though they are race-neutral on their face). Consistent with prior practice, the Court made clear that because a racial gerrymander is a racial classification, it must be reviewed with strict scrutiny even if the drafters of the redistricting plan claim that the plan was drawn with the "benign" purpose of enhancing minority voting strength, 113 S. Ct. at 2830 ("Equal Protection Clause demands strict scrutiny of all racial classifications . . . because without it, a court cannot determine whether or not the discrimination truly is "benign."); *id.* at 2826 ("[D]istrict lines obviously drawn for the purpose of separating voters by race re-

quire careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."), or claim that the racial gerrymander benefits or burdens the races equally, *id.* at 2829 (citing *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 1370 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.").

We believe that the Court's decision in *Reno* to apply strict scrutiny to a race-based apportionment plan is congruous with the Court's Equal Protection Clause analysis in other contexts where the use of racial classifications has been justified as a remedial measure or affirmative action. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (government contracting and minority set-asides); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (public employment); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (admission to public medical school). As such, *Reno* is applicable to this case because the evidence reveals that the Defendants drew certain districts in the 1992 plan to enhance the voting strength of minority voters, ostensibly with remedial purposes in mind. *See* discussion *infra* part III; *see also* Defs.' Post Trial Br. at 60 (stating that if this court finds strict scrutiny should be applied to the 1992 plan, the Apportionment Board had enough evidence to conclude that *remedial* action was necessary to comply with section 2 of the Voting Rights Act).

Although the Court in *Reno* clearly created a new means to challenge state apportionment plans pursuant to the Fourteenth Amendment, its analysis left many unanswered questions that are integral to the proper resolution of a *Shaw v. Reno* claim: (1) To what extent must "race" be a factor in an apportionment plan before the plan becomes a racial gerrymander subject strict scrutiny analysis?; (2) Is circumstantial evidence of "bizarre" dis-

trict shapes necessary to state and sustain a *Shaw v. Reno* claim?; (3) Once strict scrutiny is triggered, who has the burden of proof in a *Reno* claim?; (4) What constitutes a "compelling state interest" that would justify race-based redistricting?; and (5) What is the meaning of "narrowly tailored" in the redistricting context? We turn now to consider these issues.

B. *The Trigger for Strict Scrutiny*

The Court in *Reno* did not specify the threshold showing of racial consideration that was necessary to establish that a redistricting plan was a racial gerrymander, subject to strict scrutiny. The Court did, however, narrow the spectrum by significantly reiterating the principle that "awareness" of race or "race consciousness" in the districting process is not equivalent to a racial gerrymander that requires strict scrutiny analysis:

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

113 S. Ct. at 2826 (emphasis in original). This proposition is not novel, however, because the Court's equal protection cases "have long recognized that there is a critical distinction between 'race-conscious' action and 'race-based' action, and that the 'intentional' use of race required to trigger strict scrutiny of legislative action cannot be established simply by showing that the legislature adopted a particular course of action with knowledge that it was likely to have a particular racial impact. *Hunt*, 861 F. Supp. at 433 (citing *Personnel Adm. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (noting that the sort of "discriminatory purpose" required to trigger strict scru-

tiny of a statute that is facially race-neutral "implies more than intent as volition or intent as awareness of consequences"; it necessitates evidence revealing "that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its . . . effects upon an identifiable group")). Thus, in the redistricting context, the level of racial consideration or racial intent that is necessary to trigger strict scrutiny under *Reno* is more than "just taking action with the knowledge or awareness that it is likely to have a particular racial impact, but taking it with the *specific intent* to bring about such an impact." *Id.*; *Reno*, 113 S. Ct. at 2823 (noting that a racial gerrymander is "the *deliberate* and arbitrary distortion of district boundaries . . . for [*racial*] *purposes*") (emphasis added)).

Because we believe that the Supreme Court in *Reno* "intended to place race-based redistricting legislation into the same category as all other forms of race-based state action after *Croson*, for purposes of analysis under the Equal Protection Clause," *Hunt*, 861 F. Supp. at 429, we find that strict scrutiny of a redistricting plan is now triggered if "racial considerations played a 'substantial' or 'motivating' role in the line drawing process, even if they were not the only factor that influenced that process," *id.* at 431, and even if the state's use of race "can be said to have a 'benign' or 'remedial' purpose," *id.* at 431. *See Hays v. Louisiana*, 839 F. Supp. 1188, 1202, 1214, 1216 (W.D. La. 1993) ("*Hays I*") (majority and concurring opinion), *vacated and remanded for reconsideration due to change in law*, 114 S.Ct. 2731 (1994), *on remand*, *Hays v. Louisiana*, 862 F. Supp. 119 (W.D. La. 1994) ("*Hays II*"), *cert. granted sub nom.*, *United States v. Hays*, 115 S. Ct. 687 (1994); *see also Arlington Heights*, 429 U.S. at 265-66 ("When there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justi-

fied."). The *Hunt* court described the level of racial consideration necessary to trigger strict scrutiny as follows:

> This "race-a-motivating-factor" triggering test is necessarily met by proof that the plan's lines were deliberately drawn so as to create one or more districts in which a particular racial group is a majority, even if factors other than race are shown to have played a significant role in the precise location and shape of those districts. If the line drawing process is shown to have been infected by such a deliberate racial purpose, strict scrutiny cannot be avoided simply by demonstrating that the shape and location of the districts can rationally be explained by reference to some districting principle other than race, for the intentional classification of voters by race, though perhaps disguised, is still likely to reflect the "impermissible racial stereotypes," *Shaw*, —— U.S. at ——, 113 S. Ct. at 2827, " 'illegitimate notions of racial inferiority' " and " 'simple racial politics,' " *id. at* —, 113 S. Ct. at 2824, that strict scrutiny is designed to " 'smoke out.' " *Croson*, 488 U.S. at 493.

Hunt, 861 F. Supp. at 431-32.

This understanding of the level of racial intent needed to trigger strict scrutiny analysis in the redistricting context is the obvious implication of the *Reno* Court's adoption of the equal protection principles delineated in *Croson*, *Wygant*, and *Arlington Heights*, *see Reno*, 113 S. Ct. at 2824, 2825, 2829, 2830, 2831, 2832, and it is consistent with them. *Hunt*, 861 F. Supp. at 432 & n.19; *see also* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 643-49 (1993) (discussing *Reno* Court's importation of *Croson's* equal protection analysis, which "now serves as the paradigmatic case for equal protection analysis," to the redistricting context).

Before leaving this issue, we note that some courts that have addressed this question since the advent of *Reno*, have reached different conclusions regarding the level of racial consideration that is necessary to trigger strict scrutiny in the redistricting context. Some have concluded that race must be the sole motivation behind a particular district shape before strict scrutiny is appropriate. *See Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 278 (2d Cir. 1994) (finding that lower court order did not transgress *Reno* because "it did not instruct the City Council to redistrict *solely* on racial grounds") (emphasis added), *cert. granted and judgment vacated and remanded*, 115 S. Ct. 35 (1994); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (stating that *Reno* held "when districts are drawn in such an extremely irregular fashion as to be unexplainable, other than being based *solely* on race, a claim under Equal Protection Clause for racial gerrymandering can be stated") (emphasis added), *petition for cert. filed*, 63 U.S.L.W. 3127 (U.S. Aug. 8, 1994) (No. 94-275). This interpretation presents the attractiveness of being a very literal rendering of *Reno*'s emphasis that strict scrutiny should be applied to districts that are so irregular on their face that they "rationally cannot be understood *as anything other* than an effort to 'segregat[e] . . . voters on the basis of race.'" 113 S. Ct. at 2826 (emphasis added). Nevertheless, we agree with the *Hunt* court that this interpretation of *Reno* cannot be correct.

> If [*Reno*] meant no more than the state says it does, it would have precious little practical effect on race based districting, for it would require states to defend the deliberate creation of majority-minority districts under strict scrutiny *only* when they could not come up with any rational explanation for the location and shape of those districts other than race. This would seldom be the case, given the wide variety of other districting principles that may be

> used to justify even the most peculiar-looking districts.

Hunt, 861 F. Supp. at 429.

The Defendants propose that we adopt the triggering test of another court, which has determined that under *Reno* redistricting plans should be subjected to strict scrutiny analysis only when race is the "predominant" factor in the redistricting process. Defs.' Post Trial Br. at 55-56 (citing *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *stay granted*, 115 S. Ct. 36 (1994), *probable jurisdiction noted*, 115 S. Ct. 713 (1995)). The *Johnson* court describes it position as follows:

> [I]n order to invoke strict scrutiny, it must be shown that race was the substantial or motivating consideration in creation of the district in question. That term requires that the legislature (a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was the overriding, predominant force determining the lines of the district. If race, however deliberately used, was one factor among many of equal or greater significance to the drafters, the plan is not a racial gerrymander/racial classification subject to strict scrutiny.

Johnson, 864 F. Supp. at 1372. The *Johnson* court expressly crafted this position "to completely remove from constitutional suspicion" those redistricting plans that were well drafted with the specific racial purpose of complying with the Voting Rights Act. *Id.* The *Johnson* court was concerned that following the *Hunt* court "race-a-motivating-factor" triggering test would virtually insure long and protracted litigation for the states every time a state rightfully considers the Voting Rights Act in its redistricting process. *Id.* at 1373. The *Johnson* court was "reluctant to conclude that the Supreme Court intended [in *Reno* for] voting rights litigation to sweep the country at ten-year intervals." *Id.*

Although, we agree with the *Johnson* court that the *Hunt* and *Hays I* courts' "race-a-motivating-factor" triggering test will theoretically subject all redistricting plans that exhibit racial intent to strict scrutiny analysis, including plans that are drawn with the racial purpose of complying with the Voting Rights Act, *see Hunt*, 861 F. Supp. at 433, we decline the ideological invitation to interpret the Constitution based on the prospects of increased litigation. Any developing legal context, like the arena of legislative redistricting, is bound to produce litigation regardless of the theories that are proposed and adopted.

Instead, we have adopted the "race-a-motivating factor" triggering test because we find it is consistent with the Supreme Court's equal protection analysis in other contexts. We believe that both the "race-the-only-factor" and the "race-the-predominant-factor" triggering tests are expressly foreign to the Court's equal protection jurisprudence. As the Court noted in *Arlington Heights*:

> *Davis* does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated *solely* by a single concern, or even that a particular purpose was the *"dominant"* or *"primary"* one. . . . When there is a proof that a discriminatory purpose has been *a motivating factor* in the decision, . . . judicial deference is no longer justified.

429 U.S. at 265-66.

State redistricting plans that rightfully consider and apply the mandates of the Voting Rights Act, if challenged under the Equal Protection Clause, likely will incur strict scrutiny under the triggering test that we have adopted, but they will not be condemned automatically to constitutional invalidity. As Justice Powell's opinion

in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (public higher education), demonstrated, although strict scrutiny may limit the ability of state actors to take race-based remedial action, it does not have to be "strict in theory, fatal in fact." *Fullilove v. Kluznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring); *see also* Aleinikoff & Issacharoff, *supra*, at 643-45 (arguing that *Reno*, instead of *Crosonizing* reapportionment law, will ultimately be understood to have *Bakked* it). So long as a state is careful to narrowly tailor its redistricting plan to meet a compelling state interest, which can include compliance with the Voting Rights Act, the redistricting plan will survive strict scrutiny.

C. *Bizarre District Shapes: A Necessary Element?*

Relying on *Reno*, the Defendants contend that strict scrutiny is not required in this case because "Plaintiffs have not established that any of the districts in [the 1992 plan] are 'bizarre' or 'irregular.'" Defs.' Post Trial Br. at 55. This raises the question of whether the presence of bizarre district shapes is a necessary element to trigger strict scrutiny in a *Shaw v. Reno* claim.

Undeniably, the Court in *Reno* emphasized that the new cause of action under the Fourteenth Amendment was based on the presence of districts whose shapes were so irregular or bizarre that they rationally could not be understood as anything other than an effort to segregate voters on the basis of race. 113 S. Ct. at 2828, 2832. Such districts, however, do not draw close constitutional review simply because of their irregular shape. Adherence to traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, is not a constitutional requirement. *Id.* at 2827 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 & n.18 (1973)). Rather, bizarre-shaped districts demand strict scrutiny because their shape is circumstantial evidence that race has been a purposeful factor in their creation.

See Karcher v. Daggett, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) ("One need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation." (footnotes omitted)). Logically, therefore, the Supreme Court's use of a district's shape as circumstantial evidence of racial intent implies that proof can be made "by any means, including state concession, bizarre shape, or some combination of the various facotrs typically used to prove the 'intent' element of an equal protection claim under *Arlington Heights*." *Hunt*, 861 F. Supp. at 431; *see Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."). Virtually all the courts that have addressed this matter are in agreement with this conclusion. *See Johnson*, 864 F. Supp. at 1374 ("The Supreme Court's use of a district's shape as circumstantial evidence of legislative intent implies that proof might be made by other means. . . . This is clearly the correct approach."); *Hays I*, 839 F. Supp. at 1195 ("If everyone—or nearly everyone—involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be found without resorting to the inferential approach approved by the Court in *Shaw*."). Thus, regardless of whether the evidence is direct or circumstantial or whether bizarre district shapes are present or not, if the evidence indicates that race was a substantial or motivating factor in the apportionment plan, then a *Shaw v. Reno* claim is stated and strict scrutiny analysis is required.

D. *Burden of Proof*

The parties agree that the Plaintiffs in this equal protection challenge bear the ultimate burden of persuasion throughout the proceeding. *See Batson v. Kentucky*, 476 U.S. 79, 93-94 & n.18 (1986); *Wygant*, 476 U.S. at 277-78. If the Plaintiffs offer proof that the redistricting plan is race-based, then this gives rise to a presumption that the plan is unconstitutional, and the burden shifts to the Defendants to demonstrate that their use of race was narrowly tailored to meet a compelling state interest. *See Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436. Yet, the Defendants' shifted burden is one of production only, not persuasion. The Plaintiffs still bear the ultimate burden of persuading the court that the Defendants did not have a compelling state interest that justified their use of race in apporionment process or that the Defendants' redistricting plan was not narrowly tailored to meet such an interest. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring), *Hunt*, 861 F. Supp. at 436.

E. *Compelling State Interest*

Next, we consider those reasons that might serve as a compelling state interest, justifying a state's decision to engage in race-based redistricting. At this point, we are not concerned with whether the Defendants had a compelling justification for their consideration of race in the 1992 plan; we are concerned with whether the Defendants had a compelling justification for *any* redistricting plan that considered race as a substantial or motivating factor. The question of "whether the particular plan under challenge takes race into account to a greater degree than necessary to further a compelling state interest is a question for the 'narrowly tailored' prong of the strict scrutiny analysis, which examines the 'fit' between the compelling state interest and the precise means chosen by the state to accomplish it." *Hunt*, 861 F. Supp. at 437 (citing *Wygant*, 476 U.S. at 280 & n.6, and *Fullilove*, 448 U.S. at 507 (Powell, J., concurring)). With-

out presenting an exhaustive review of those reasons that theoretically might serve as a compelling state interest in the redistricting context, we have chosen to limit our discussion to the compelling interest that the Defendants have offered in this case—compliance with section 2 of the Voting Rights Act. Defs.' Post Trial Br. at 57-63.

In *Shaw v. Reno*, the state argued that compliance with the Voting Rights Act was a compelling state interest. 113 S. Ct. at 2830. The Court, however, stopped short of totally endorsing this claim: "The states certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." *Id.* Obviously, the Court is aware that in strict scrutiny parlance a "compelling state interest" is a term of art. Thus, we do not think the Court's choice of the words "very strong interest" is insignificant. It suggests to us that the Voting Rights Act may serve as a compelling state interest in some circumstances, but in others, state action in conformity therewith may violate the Equal Protection Clause of the Fourteenth Amendment. *See Johnson*, 864 F. Supp. at 1381; *see also Johnson v. De Grandy*, 114 S. Ct. 2647, 2666-67 (1994) (Kennedy, J., concurring) ("Given our decision in *Shaw*, there is good reason for state and federal officials with responsibilities related to redistricting [that are engaging in remedial action pursuant to section 2 of the Voting Rights Act], as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause.").

Previously, the Court has recognized a state's compelling interest in taking race-based remedial measures to eradicate the effects of past racial discrimination. *Reno*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82). Furthermore, the Court has recognized that this interest extends to remedying

past or present violations of federal statutes that were intended to eliminate discrimination in specific aspects of life. *See Croson*, 488 U.S. at 500 ("constitutional or statutory violation"); *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring) ("violation of federal statutory or constitutional requirements"). Moreover, the Court has clarified that a state does not have to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277); *Hunt*, 861 F. Supp. at 437.

Applying these principles to the redistricting context and the Voting Rights Act, the *Hunt* court developed a very useful standard by which to determine when the Voting Rights Act can serve as a compelling state interest:

> Under these principles, we think it clear that a state has a "compelling" interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a "strong basis in evidence" for concluding that such action is "necessary" to prevent its electoral districting scheme from violating the Voting Rights Act.
>
> . . . .
>
> A state has a "strong basis in evidence" for concluding that it must engage in race-based redistricting in order to comply with the Voting Rights Act when it has information sufficient to support a *prima facie* showing that its failure to do so would violate the Act. *See Croson*, 488 U.S. at 500 (majority) (evidence "approaching a prima facie case of a constitutional or statutory violation").

Hunt, 861 F. Supp. at 437-439; *see Johnson*, 864 F. Supp. at 1381; *Hays I*, 839 F. Supp. at 1217 (Walter, J., concurring).

Generally, to establish a prima facie case that a single-member redistricting plan violates section 2 of the Voting Rights Act, a plaintiff must show three things, the *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority-group " 'is politicaly cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))); *Johnson*, 864 F. Supp. at 1387; *Hunt*, 861 F. Supp. at 440. Thus, when a state has reliable information that indicates the relevant minority group could establish a prima facie challenge to the existing districting plan under section 2 of the Voting Rights Act, then it has a "strong basis in evidence" for concluding that it must engage in race-based redistricting to comply with section 2 of the Voting Rights Act, and it has established a "compelling interest" for the remedial measures. *Hunt*, 861 F. Supp. at 440; *see Hays I*, 839 F. Supp. at 1217 (Walter, J., concurring).

F. *Narrowly Tailored*

Finally, we consider how to determine whether a racial gerrymander, if justified by a compelling state interest, is narrowly tailored to further that interest. The Court provided little help with this issue in *Reno*, other than to say that in the context of a challenge under section 5 of the Voting Rights Act, "[a] reapportionment plan would not be narrowly tailored if the State went beyond what was reasonably necessary to avoid retrogression." Therefore, we agree with the *Hunt* and *Hays I* courts

that the best analytical approach is to examine the Court's decisions that apply the narrowly tailored standard in other race-based remedial contexts. *See Hunt*, 861 F. Supp. at 444-45; *Hays I*, 839 F. Supp. at 1206-09, 1215 (majority and concurring opinions).

In other race-based contexts, the Court has examined five factors to determine whether a race-based affirmative action plan is narrowly tailored to serve the compelling state interest in remedying the discrimination: (1) the efficacy of alterative remedies that were less race-based or race-neutral; (2) whether the plan utilizes a fixed racial quota or a flexible racial goal; (3) the duration of the plan; (4) the relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates; and (5) the impact of the plan on the rights of third parties. *See United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (plurality); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 485-89 (1986) (Powell, J., concurring); *see also Croson*, 488 U.S. at 507-08; *Wygant*, 476 U.S. at 279-84. Although these criteria were developed in contexts other than race-based redistricting, we think they are easily adapted to this context. While we have engaged in a rigorous analysis, our inquiry has been careful and sensitive.

Considering the first factor, a court must decide whether the state could have accomplished its compelling interest by some means that was less race-based or race-neutral. *Wygant*, 476 U.S. at 280 n.6. If compliance with the Voting Rights Act is a state's compelling interest then, obviously, a race-neutral alternative does not exist. Assuming race must be considered to comply with the Voting Rights Act, the question then becomes whether a state could have complied with the Voting Rights Act with means that were less race-based. The Plaintiffs in this case do not allege that the Apportionment Board created more majority-minority districts than is reasonably

necessary to comply with the Voting Rights Act. Rather, they generally claim that the Board packed black voters into districts to comprise less than a majority, where a black minority population, in conjunction with significant white crossover votes, already had ample opportunity to elect the candidate of its choice without the addition of the black voters. This packing of black voters into districts where they were not needed allegedly resulted in a waste of black votes in the "packed" districts and a loss of minority "influence" in those districts where the black voters were previously located. Assuming *arguendo* that such race-based measures truly further compliance with section 2 of the Voting Rights Act, the analytical quesion becomes a two-fold concern: whether the 1992 plan creates more "packed" districts than is reasonably necessary to comply with the Act and whether the "packed" districts it creates contain substantially larger concentrations of minority voters than is reasonably necessary to give minority voters a realistic opportunity to elect representatives of their choice in those districts. *See Hunt*, 861 F. Supp. at 446; *Hays I*, 839 F. Supp. at 1206-08.

Regarding the second factor, a court must determine whether the challenged plan requires a fixed racial quota that is crafted to achieve a racial balance or requires a flexible goal to be used as a standard in gauging the state's efforts at eradicating the discrimination in question. *See Sheet Metal Workers*, 478 U.S. at 477-78. We agree with the *Hunt* court that racial gerrymanders will "seldom be invalid on this ground" because they do not impose a fixed racial quota. 861 F. Supp. at 446. Even if a state creates a certain number of districts that are designed to elect minority representatives, there is no guarantee that minority representatives will be elected. Thus, such districts can hardly be viewed as anything other than examples of an acceptable, flexible goal for minority representation. *See Sheet Metal Workers*, 478 U.S. at 487-88.

The third factor invokes consideration of the planned duration of the remedial measure. If it is not a temporary provision, it may last longer than reasonably necessary to eliminate the effects of the targeted discrimination. *See id.* at 479 (noting that a temporary race-based remedial measure is acceptable because it "will end as soon as . . . it is no longer needed to remedy past discrimination"). A race-based redistricting plan in Ohio will likely satisfy this test because the State is required, as a practical matter, to redistrict after each decennial census, and this will result in re-consideration and possible termination of the previous race-based plan.

The fourth factor requires the court to consider whether the remedial plan presents a reasonable relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates. As applied to the redistricting context, we think this requirement is satisfied so long as the percentage of racially-packed districts does not substantially exceed the percentage of minority voters throughout the state. *See Johnson v. De Grandy*, 114 S. Ct. at 2658 & n.11 (noting that ultimate right of section 2 of Voting Rights Act is minority voters' equal opportunity to elect candidate of their choice, as measured by proportionality between percentage of majority-minority voting districts in state to minority members' share of the relevant population throughout the state).

The fifth factor requires a court to consider whether the challenged plan "impose[s] an unacceptable burden on innocent third parties." *Paradise*, 480 U.S. at 182. As applied to the redistricting context, we agree with the *Hunt* and *Hays I* courts that "a race-based redistricting plan imposes an unacceptable burden upon third parties, [and] hence is not sufficiently 'narrowly tailored' to survive constitutional muster, if it fails to comply with redistricting principles that are themselves constitutionally

mandated, like the 'one person, one vote' standard and the prohibition against undue dilution of the voting strength of any identifiable group of voters." *Hunt*, 861 F. Supp. at 449; *see Hays I*, 839 F. Supp. at 1208. Like the *Hunt* court, however, we do not think that a racial gerrymander imposes an unacceptable burden on third parties simply because the redistricting plan has a bizarre shape or deviates from traditional districting principles, which, themselves, are not constitutionally mandated.[7] *Hunt*, 861 F. Supp. at 449-56.

At this point we note that it is important for all the issues presented in this case to be analyzed in a way that gives expression to the constitutionally and statutorily based national goal of protecting the rights of persons victimized by historic discrimination, so that they may effectively participate in changing public polices to "ensure nondiscrimination and fair opportunities in education, employment, housing, and other areas." Arthur A. Baer & Pamela S. Karlan, *Voting Rights Act Enforcement: An Agenda for Equal Electoral Opportunity, in New Challenges, The Civil Rights Record of the Clinton Administration Mid-term* 169 (Report of the Citizen's Commission on Civil Rights, 1995).

Court decisions of today must be mindful of the Supreme Court's admonition over one hunderd years ago in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), that the right to vote is a "fundamental political right, because preservative of all rights." The unanswered questions in *Shaw v. Reno* must not be responded to in such a way

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[7] Consider the words of Chief Justice Warren Burger in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), where the Court considered and approved the use of race-sensitive remedies to combat segregated schools. "The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations; and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system." *Id.* at 28.

as to gut the Voting Rights Act's promise of equal electoral opportunity. When minority voters are packed into a district where they are unnecessary to the election of the minority's candidate of choice, who is capable of "changing public policies," such a plan must be justified by a compelling governmental purpose. This is particularly true when the effect of such a scheme is likely to be to reduce the opportunity for minority voters to coalesce with other voters to influence the election of candidates of their choice in the districts from which they are drawn. When this occurs the very spirit of the Voting Rights Act is eroded. The risk has prompted us to reject portions of the 1992 plan at issue here.

III. Findings of Fact and Conclusions of Law

Based on our review of the evidence submitted by both parties, we find, for the following reasons, that race was a substantial and motivating factor in the Defendants' 1992 apportionment plan:

1. The Plaintiffs claims of racial gerrymandering are somewhat unusual in this case. First, they allege that the Defendants drew race-based legislative districts in the urban areas of Ohio and that this decision had the ripple effect of causing irregular shaped districts throughout the State, which violated the traditional districting principles embodied in the Ohio Constitution, particularly Article XI, § 7. Pls.' Second Am. Compl. ¶ 55. In addition, the Plaintiffs alleged that some of the race-based districts, themselves, had irregular shapes in violation of the traditional districting principles contained in the Ohio Constitution. *Id.* Finally, the Plaintiffs alleged that the racially gerrymandered districts "included" House districts 31, 30, 22, 21, 38, 39, 44, and 49. *Id.* ¶ 56. The Defendants contend that the Plaintiffs are limited to challenging only these eight districts, which were identified in their complaint. The De-

fendants, however, mischaracterize the Plaintiffs' complaint. The word "included" clearly is not an exclusive term. Thus, the eight districts identified in the complaint were illustrative of the alleged race-based districts but not necessarily an exclusive listing of them. That said, however, we note that we are not concerned with districts whose irregular shape may have been the ripple effect of another district that was racially gerrymandered. Such an irregular district may indeed violate proscriptions of the Ohio Constitution, but the focus of a *Shaw v. Reno* claim is racial gerrymandering in violation of the Fourteenth Amendment to the United States Constitution. Thus, we are only concerned in this case with districts that allegedly have been racially gerrymandered.

2. The Defendants admittedly considered race when drafting their 1992 apportionment plan. The Apportionment Board instructed Tilling to "draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act," and Tilling attempted to comply. Hr'g Tr. at 208. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act. *Id.* at 308.

3. Before Tilling drafted an apportionment plan, he attended public hearings throughout the state. At these hearings the Apportionment Board heard testimony from some members of the minority community requesting the Board to enhance minority voting strength by creating more majority-minority districts. Defendants' Post-Trial Br. at 2-3. At these hearings, Tilling publicly stated that consideration of and compliance with the Voting Rights Act was an important principle guiding the apportionment process. *Id.* at 3-5.

4. The Apportionment Board's Findings and Conclusions, adopted on February 18, 1992,[8] in support of the 1992 plan, also reveal that race was a substantial and motivating factor in the apportionment process. Based on the conclusions that the Voting Rights Act protected classes of voters, not incumbents, *see, e.g.*, Bd. Findings ¶¶ 177, 183, and that racial bloc voting existed throughout the State of Ohio, including districts containing minority voters, *id.* ¶¶ 124, 167, the Apportionment Board decided that it needed to create districts that would contain sufficient black population to guarantee the election of any new (non-incumbent) black candidate. Thus, the Board through Tilling added black voters to minority districts outside of Cuyahoga County because "there [wa]s insufficient black population in the minority districts to guarantee the election of a black candidate particularly given levels of voter turnout and racial bloc voting in the district." *Id.* ¶ 168. Obviously, one of the working assumptions in this process was that black voters would choose a black candidate as their representative.

5. The Board's analysis of incumbency elections in minority districts for 1984, 1986, 1988, and 1990, revealed an incumbency advantage of six to ten percent, *id.* ¶ 171, 173, and the Board concluded that it was unreasonable to configure districts based on the current incumbent because the successful incumbents might retire, die, or move on to other political positions during the 90's, *id.* at 172. *See also* Bd. Conclusion of Law ¶ 9 ("It is unreasonable to reconfigure minority districts based on the electoral success of minority incumbents. Further, such reconfiguration will result in impermissible minority

[8] The Apportionment Board has not met since February 18, 1992, either to change or modify its findings regarding the 1992 plan. Thus, these findings constitute direct evidence of the Apportionment Board's rationale and justification for the 1992 plan.

vote dilution. Consideration of factors such as racial bloc voting, voter turnout, population shifts, demographics, incumbency factors, voting patterns and other such factors require that minority districts outside Cuyahoga County must reflect increased relative percentages of black voting age population.") Accordingly, the Board determined that "unless Black Voting Age Population margins are adopted in minority districts, minorities risk losing minority districts." Bd. Findings ¶ 174.

6. In Franklin County, the Board drew district lines to enhance the possibility of electing a new black candidate. Board Finding 189 indicates that Tilling "reconfigured House districts 29 and 31 in Franklin County to protect minority voters in those districts and to create a minority Senate District in Franklin County where none previously existed." *Id.* ¶ 189. Tilling testified that the incumbent black legislators, Resp. Miller and Beatty, had indicated a desire to run for different offices, and because the Voting Rights Act protects classes of voters and not incumbents, black voters were added to the districts of Reps. Miller and Beatty to achieve this goal. *Id.* ¶ 189. The percentage of black population in Rep. Miller's district, H.D. 22 under the 1992 plan, was increased from 38.50% to 44.68%, a 6.18% increase, which is within the 6-10% standard that would be necessary to compensate for the possible loss of incumbency advantage. Defs.' Supp. Exs., Vol. I, Ex. DD. Likewise, the black population in Rep. Beatty's district, H.D. 21 under the 1992 plan, was increased from 46.80% to 54.30%, an increase of 7.50%. *Id.* Both Miller and Beatty previously had been elected to six and seven terms, respectively, Bd. Findings ¶ 162, by pluralities of better than two-to-one.

7. In Lucas County, the Board drew lines to enhance the possibility of electing a new black candidate. Tilling stated that he drew the districts in Lucas

County "to protect a class of voters, not the particular incumbent in that situation." *Id.* ¶ 177. Tilling added additional minority votes to Rep. Casey Jones' district H.D. 49 under the 1992 plan, "not because Casey Jones needed them but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candidate of their choice." *Id.* Moreover, Tilling accepted the rationale of increasing minority voters in Casey Jones district because the growth of the University of Toledo had displaced a number of individuals, causing some shift of population in his district, and because Jones might be nearing retirement age. *Id.* ¶ 195. The black population in Jones' district was increased from 41.70% to 49.99%, an increase of 8.29%. Defs.' Supp. Exs., Vol. I, Ex. DD.

8. In Summit County, the Board drew lines to enhance the possibility of electing new black candidates. Based on the conclusion that Rep. Vernon Sykes' district, H.D. 44 under the 1992 plan, was "losing black population and to avoid minority vote dilution." Bd. Findings ¶ 194, the Board increased the black population in Sykes' district from 35.40% to 43.07%, an increase of 7.67%, Defs.' Supp. Exs., Vol. I, Ex. DD. Previously Sykes had been elected to five terms by margins of two-to-one. Bd. Findings ¶ 162.

9. In Montgomery County, the Board drew lines to guarantee the election of new black candidates. Again, based on "population shifts" and the desire to "avoid dilution of minority voting," the Board increased the black population in Rep. McLin's and Rep. Roberts' districts, H.D. 38 and H.D. 39, respectively under the 1992 plan. *Id.* ¶ 193. The black population in McLin's district was increased from 42.10% to 44.47%, an increase of 2.30% and the black population in Roberts' district was in-

creased from 36.10% to 40.69%, an increase of 4.59%. Defs.' Supp. Exs., Vol. I, Ex. DD.

10. In Hamilton County, the Board drew lines to enhance the possibility of electing new black candidates. The Board found the following:

> Mr. Tilling, in drafting the 1991 Apportionment Plan, also determined that the Voting Rights Act protected classes of voters not incumbents. Since Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 [H.D. 31 in the 1992 plan] to increase the relative percentage of black population in that district in order to provide an opportunity for a new black candidate, without the benefit of incumbency, to be elected in the district.

Bd. Findings ¶ 183. Accordingly, the Board increased the black population in Mallory's district from 45.90% to 49.16%, an increase of 3.26%. Defs.' Supp. Exs., Vol. I, Ex. DD. The Board also increased the black population in Rep. Rankin's district, H.D. 30 in the 1992 plan, from 53.20% to 55.98%, an increase of 2.78% in a district that was already a majority-minority district. *Id.* The Board increased the black population in Rankin's district allegedly because "[a] new black candidate would require a district with increased black population to be successful." Bd. Findings ¶ 186.

11. In addition to the Apportionment Board's Findings and Conclusions, Tilling, who was the principal architect of the apportionment plan, kept handwritten notes that indicated his procedure and his use of race in drawing the original apportionment plan. *See* Pls.' Ex. Prior Proceeding B, No. 120. The notes revealed that in his first five steps Tilling calculated the ideal population size of the Senate and House districts, pursuant to Article XI, Section 2

of the Ohio Constitution, and determined those counties that had populations within five percent of the ideal in accordance with Article XI, Section 10 of the Ohio Constitution. Beginning with step six and continuing with each urban county thereafter, the notes repeatedly indicate that Tilling displayed the minority population of each urban county on his computer screen and then drew the "minority districts" first before proceeding. This process and the attention to racial composition was confirmed at the hearing when Tilling testified concerning the maps of the urban districts drawn in accordance with the process contained in the notes. Hr'g Tr. at 344-51. Viewed sequentially, the maps indicated that for each urban county, the minority population was displayed; the most heavily black districts were drawn first; and each succeeding district that was drawn contained a decreasing percentage of black population. The Plaintiffs claim that the maps in conjunction with the notes establish that race was "the predominant concern of Mr. Tilling and the Board." Pls.' Post Trial Br. at 14. The Defendants contend that Tilling's notes and the corresponding maps are irrelevant because they refer to the original "model" plan that Tilling submitted to the Board on September 26, 1991. Although it is true that this exact plan was never in effect and was modified on numerous occasions, we still find it probative of the Defendants' consideration of race in the redistricting process. The fact remains that a not-too-distant forerunner of the 1992 plan was drawn in the aforementioned manner, and the Defendants do not contend that the 1992 plan totally discarded the procedure and results of the original plan.

12. Based on the foregoing facts, we conclude that race was a substantial and motivating factor in the Defendants' creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan. These House

districts are the result of racial gerrymandering. Although none of these districts presents a bizarre shape, both direct evidence from trial testimony and the Apportionment Board's Findings and Conclusions, and circumsatntial evidence from Tilling's notes and the accompanying maps, reveal that the Defendants intentionally crafted these eight districts, at least in part, with the purpose of separating voters on the basis of race.

13. Because race was a substantial and motivating factor in the 1992 plan, it must be subjected to strict scrutiny analysis. *Reno*, 113 S. Ct. at 2825, 2826, 2830. Thus, the burden of production shifts to the Defendants to show that the 1992 plan was narrowly tailored to meet a compelling state interest. *See Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436.

14. The Defendants claim that compliance with section 2 of the Voting Rights Act was the compelling state interest that justified their race-based redistricting. Defs.' Post Trial Br. at 57-63.

15. The Defendants agree that in order to show that section 2 of the Voting Rights Act was a compelling state interest, they must have a strong basis in evidence that race-based redistricting was necessary as a remedial measure to comply with the Voting Rights Act. *Id.* at 59-60. Moreover, the Defendants agree that a state has a "strong basis in evidence" to conclude that it needs to engage in race-based redistricting to comply with section 2 of the Voting Rights Act when the state has information that is reasonably sufficient to lead it to conclude that the relevant minority group could make out a prima facie section 2 challenge to the existing plan. *Id.* at 59, 60, 63.

16. As we noted earlier, a plaintiff can establish a prima facie case of a violation of section 2 of the Voting Rights Act by providing evidence that satisfies the three *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1984 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))).

17. Assuming without holding that the Defendants possessed information that would lead them to reasonably conclude that a plaintiff could satisfy the first two *Gingles* factors, we hold that the Defendants did not have a "strong basis in evidence" to engage in race-based redistricting in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan because they did not possess information that would reasonably lead them to conclude that a plaintiff could satisfy the third *Gingles* factor—the presence of racial bloc voting.

18. Both this court and the Supreme Court previously held on the basis of all the evidence, that racially polarized voting did not exist in Ohio's legislative elections. The Court noted the following:

> [A]ppellees [Plaintiffs in this case] have failed to demonstrate *Gingles'* third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that Ohio does not suffer from "racially polarized voting." 794 F. Supp. at 700-01. Accord, App. to Juris. Statement 132a-134a, and n.2, 139a-140a. Even appellees agree. *See* Tr. of Oral Arg. 25. Here, as in *Gingles*, "in the

> absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles*, 478 U.S. at 49 n.15, 106 S.Ct. at 2766 n.15.

Quilter, 113 S. Ct. at 1158; *see also Quilter*, 1992 WL 677145, at *4 & n.2, n.3, *8 (holding that Ohio has coalitional voting, where whites cross over and vote for black candidates, and not polarized voting, where whites vote for white candidates and blacks vote for black candidates). By relying on these precedents, we are not saying that the Apportionment Board could not take race into account unless and until it had been proven in a court that a violation of section 2 of the Voting Rights Act had occurred. As we noted earlier, a state is not required to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277). Our point in noting the previous rulings of this court and the Supreme Court regarding the absence of polarized voting in Ohio was to emphasize that what was readily and reasonably apparent to and held by the courts, also should have been reasonably apparent to the Defendants—racially polarized voting does not exist in Ohio's legislative elections.

19. The Defendants contend that Tilling reasonably concluded that "racial bloc voting existed throughout Ohio." Defs.' Post Trial Br. at 62 & n. 45. Yet, the bivariate regression analysis of the Plaintiffs' expert, Dr. Henderson, for the election years 1990, 1986, and 1984, revealed the presence of coalitional voting in each of the districts where the Defendants, through Tilling, chose to engage in race-based redis-

tricting in the 1992 plan. *See Quilter*, 1992 WL 677145, at *4 & n.2. The percentage of white cross-over vote in each of those districts was as follows: Rep. Mallory—50.66%; Rep. Rankin—50.93%; Rep. Miller—44.50%; Rep. Beatty—50.25%; Rep. McLin—35.44%; Rep. Roberts—45.98%; Rep. Sykes—48.76%; Rep. Jones—44.46%. *Id.* at *4 n.2. Prior to the time that the Defendants adopted "Amendment D," the 1992 plan, their own expert, Dr. King, analyzed over 200 elections throughout Ohio, and he concluded that a "degree of racially polarized voting existed in Ohio," but he was not willing to characterize the degree of racial polarization as "legally significant." Defs.' Post Trial Br. at 63 & n. 47. Regardless of Dr. King's ability to comment on the "legal" significance of his analyses, the fact remains that Dr. King did not challenge Dr. Henderson's results on this point. *See Quilter*, 1992 WL 677145, at *4 n.3. Dr. King's own results regarding polarized voting in Ohio revealed that on average 95% of blacks voted for black candidates and 56.7% of whites voted for black candidates, thereby confirming Dr. Henderson's results. *Id.* at *4 n.2. In the Apportionment Board's Findings and Conclusions, the Board even admitted the presence of white cross-over voting in the minority districts where race-based remedial measures were utilized. Bd. Findings ¶ 168. Given the overwhelming statistical evidence of coalitional voting under the existing plan, and given the fact that the Defendants had this information available to them before they adopted the 1992 plan, with its race-based remedial measures, we find that the Defendants could not reasonably conclude that the relevant minority group could establish a prima facie case of a violation of section 2 of the Voting Rights Act. Significant evidence of white majority bloc voting in Ohio's legislative districts did not exist.

20. Because the Defendants did not possess a strong basis in evidence that they needed to engage in race-based redistricting to comply with section 2 of the Voting Rights, the Act does not provide a compelling state interest to justify the remedial action. *See Hunt*, 861 F. Supp. at 440.

21. Because the Apportionment Board lacks a compelling state interest for its racial gerrymandering in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan, we conclude that these districts violate the Equal Protection Clause of the Fourteenth Amendment. Based on our holding, we find it unnecessary to discuss whether the 1992 plan was narrowly tailored to further a compelling state interest.[9]

IV. Conclusion

The Fourteenth and Fifteenth Amendments to the United States Constitution, and the Voting Rights Act of 1965 have been major vehicles for the empowerment of black Americans long denied the full enjoyment of their political rights. Over the years, various schemes and artifices have been designed to serve as impediments to the attainment of citizenship status by minorities. As Justice Frankfurther, however, wrote for the Supreme Court in *Lane v. Wilson*, 307 U.S. 268, 275 (1939), "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Without char-

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[9] We note, however, for instructional purposes that any redistricting plan that, for race-based remedial purposes, proposes to move black voters into a district that already has more than 35% black population, may have a difficult time passing the narrowly-tailored prong of strict scrutiny analysis. Statistical evidence in Ohio revealed that there was only one legislative district in the last twenty-five years that had more than 35% black population and did not elect a black candidate. *Quilter*, 1992 WL 677145, at *8 & n.5. Thus, currently in Ohio, 35% black population in a district is considered adequate to provide the black population with an equal opportunity to elect the candidate of its choice, since it has been shown that Ohio does not have a history of racially polarized voting in the state legislative districts at issue here. *Id.*

acterizing the nature of the discrimination present here, we simply hold that Justice Frankfurter's admonition is equally applicable to the Equal Protection Clause of the Fourteenth Amendment. Using race to draw lines to concentrate black voters in discrete legislative districts with the reciprocal effect of siphoning off and reducing their influence in other districts, without legally cognizable justification, is incompatible with the Constitution, as now interpreted by the Supreme Court. Accordingly, we direct the State Defendants to redraft House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan to comply with the aforementioned principles.

In placng reliance on this court's and the Supreme Court's holdings that racial bloc voting had not occurred in Ohio's legislative elections, we make no judgment as to the state of racial progress in other aspects of race relations in Ohio. The fact that black voters, however, in the various legislative districts, as shown by the record in this case, coalesce with white voters in significant enough numbers to elect candidates of their choice, who happened to be black, demonstrates a high degree of maturity. In our view, this degree of voter maturity represents the essence and ultimate objective of the Voting Rights Act and the Constitution. We must not, we dare not permit a retreat from this admirable advance in electoral politics by approving a plan such as this.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze, Sr.
ANTHONY J. CELEBREZZE, SR.
U.S. Circuit Judge

DOWD, J., dissenting.

The reapportionment of the Ohio General Assembly, required and strictly controlled by the Ohio Constitution, is done every ten years and follows the decennial census. Increases, decreases and shifts in population inevitably require that the boundary lines for the 99 seats in the House of Representatves be redrawn and, as a consequence, the boundary lines for the 33 seats in the Senate since each senate district consists of three discrete house districts.

The Apportionment Board (the Board), as established by the Ohio Constitution, consists of the Governor, the Secretary of State, the State Auditor and a single representative from each of the two major political parties in the Ohio General Assembly. Consequently, the political party that controls at least two of the three statewide offices will have majority representation on the Board.

At the time of the most recent reapportionment, for the first time in 30 years, the Republican Party, holding the offices of Governor and Secretary of State, had a majority of three on the Board. The two minority members of the Board, Auditor Ferguson and Representative Quilter together with other members of the Democratic Party commenced litigation to wrest control of Ohio's reapportionment process from the majority of the Board and place it with the federal court system. The litigation, in its fourth year, continues—even *after* two elections conducted pursuant to Amendment D adopted by the majority of the Board.

The first effort to shift the responsibility for reapportioning Ohio from the Board failed with the decision of the United States Supreme Court in *Voinovich v. Quilter*, —— U.S. ——, 113 S.Ct. 1149 (1993)[1] and the subse-

[1] The rulings challenged before the Supreme Court were reached in several incremental steps. On January 31, 1992, a majority of

quent decision of this Court in *Quilter v. Voinovich*, 857 F.2d 579 (N.D. Ohio 1994) responding to the Supreme Court's remand of the issue of whether the deviations in excess of 10% in the size of several districts in Ohio violated the Fourteenth Amendment.

Before this Court responded to the remand issue in March of 1994, but after the announcement of the *Voinovich* decision, and in contrast to that unanimous decision,

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this Court, addressing only the federal statutory challenge, found in favor of the plaintiffs and ordered that the Board either redraft the Plan or demonstrate that the existing Plan was remedying a Section 2 violation. *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992). I dissented. Subsequently, the Board presented to the Court its justification for the creation of majority-minority districts, along with certain "technical" amendments to the Plan. The Board's Findings and Conclusions are on the record of this case at Docket No. 147, Exhibit A. They include findings that voting in Ohio is significantly racially polarized, that there is a history of official discrimination in Ohio affecting the rights of minorities to participate in the democratic process, that there is racial bloc voting, and that minorities have experienced racial barriers to effective participation in the democratic process in Ohio. (Docket No. 147, Exh. A, ¶¶ 99-100, 107-137). These findings were simply disregarded by the majority when, on March 10, 1992, it held once again that the Plan, as amended, violated the Voting Rights Act. The Court appointed a special master to prepare a redistricting plan. *Quilter v. Voinovich*, 794 F. Supp. 756 (N.D. Ohio 1992). Again I dissented. Later, a majority of the Court found that the Plan also violated the Fourteenth and Fifteenth Amendments to the United States Constitution. *Quilter v. Voinovich*, No. 5:91CV2219, 1992 WL 677145 (N.D. Ohio Mar. 19, 1992). In that opinion, the majority specifically found that there were "three critical facts: the absence of racial bloc voting, the fact that black voters have been able to elect both black and white candidates of their choice, and the fact that such candidates have been elected over a sustained period of time." *Id.* at *2. The Supreme Court never directly addressed these particular findings of the majority, other than to note them. *See, Voinovich v. Quilter*, 113 S.Ct. at 1154. I, however, adhere to my original view that the defendants did properly justify a need to create majority-minority districts. *Quilter v. Voinovich*, 794 F. Supp. at 758 (Dowd, J., dissenting).

the United States Supreme Court by a five-four vote held in *Shaw v. Reno,* —— U.S. ——, 113 S.Ct. 2816 (1993) that a complaint that alleges redistricting so bizarre on its fact that it is unexplainable on grounds other than race states a cause of action under the Equal Protection Clause of the Fourteenth Amendment and is not subject to a motion to dismiss. The Supreme Court majority further held that such allegations demand the same strict scrutiny under the Equal Protection Clause that is given other state laws that classify citizens by race.

Following *Shaw v. Reno,* the plaintiffs were permitted to file an amended complaint and, for the first time, raised an equal protection claim. The Court heard testimony for two days in November of 1994 and the positions of the parties have been fully briefed.

I respectfully dissent from the opinion of my colleagues as I believe judgment should be entered for the defendants on several grounds, each of which stands independently of the others. Further, my reasoning is based upon facts which I would have included in the Findings of Fact, had I wrtten the majority opinion. These facts are attached to this dissent as Appendix A. Several of the facts are also incorporated herein.

I. THIS THREE-JUDGE PANEL'S CONSIDERATION OF THE PLAINTIFFS' ACTION TO SET ASIDE THE REAPPORTIONMENT OF THE 99 HOUSE DISTRICTS AND 33 SENATE DISTRICTS FOR THE OHIO GENERAL ASSEMBLY WAS LIMITED TO THE SCOPE OF THE REMAND BY THE UNITED STATES SUPREME COURT AND CONSEQUENTLY THIS COURT SHOULD NOT HAVE PERMITTED THE PLAINTIFFS TO FILE A SECOND AMENDED COMPLAINT RAISING FOR THE FIRST TIME THE EQUAL PROTECTION CLAIM.

It is well established that an inferior court does not have, save in unusual circumstances, the power or authority to deviate from the mandate issued by an appellate court. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948); *Stanton v. Stanton*, 429 U.S. 501, 502, 504 (1977).

The Supreme Court remanded this case for a single and limited purpose of determining whether the Plan's deviation from equal population among the districts violated the Fourteenth Amendment. *Voinovich v. Quilter*, —— U.S. ——, 113 S.Ct. at 1154. Upon remand, this Court decided that issue. *Quilter v. Voinovich*, 857 F. Supp. 579 (N.D. Ohio 1994). Consequently, this case should have been concluded at that point.

In granting the plaintiffs' motion for leave to file a second amended complaint, the majority of this Court reasoned that because *Shaw v. Reno* was decided after the Supreme Court issued its decision in this case, the Ohio reapportionment plan should be reevaluated. *Quilter v. Voinovich*, 157 F.R.D. 36, 40 (1994). Assuming that concept has merit, such review required a new lawsuit

and a new draw, with a probable different three-judge panel.[2]

I dissented when my colleagues granted the plaintiffs the right to file a Second Amended Complaint to raise for the first time, post remand, an Equal Protection Claim. I continue to hold that it was an abuse of discretion to grant that motion and that this case should have been considered closed once the Court determined the issue remanded by the Supreme Court. Thus I would rule that the motion to allow the Second Amended Complaint was improvidently granted. I would revisit the motion, deny it and close the case.

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[2] This district court has gone to great lengths in the past five years to avoid any opportunity for lawyers to select the judge they wish to have adjudicate their lawsuit. The related case rule has been abolished and, consequently, even if a new case appears related to an existing case on another judge's docket, it cannot be shifted to the docket of the judge who drew the first case absent the consent of both judges. *See*, Local Rules 1:2.4(2) and 6:2.5(c). Moreover, one judge cannot transfer an unrelated case on his or her docket to another judge without the approval of the Chief Judge of the distirct. *See*, Local Rule 6:2.4. Consequently, had "new law suit" been filed challenging the reapportionment based on *Shaw v. Reno*, it could have been filed in either the Northern or Southern District of Ohio and it would have been assigned to a judge of that district. The provisions of 28 U.S.C. § 2284 would then have been invoked and the Chief Judge of the Circuit would have had the opportunity to determine anew which judges he wished to assign to the case. However, a majority of this Court, presumably unaware of or, as Circuit Judges, completely indifferent to the impact of the Court's Local Rules, elected to use their assignment to this three-judge panel to give the plaintiffs another bite at the apple.

II. THE EQUAL PROTECTION CLAIM IN A LEGISLATIVE REAPPORTIONMENT CASE IS CONSTRAINED BY THE NARROW LIMITS OF THE MAJORITY OPINION IN *SHAW V. RENO* AND AN EXAMINATION OF THE REAPPORTIONED BOUNDARY LINES OF THE HOUSE AND SENATE DISTRICTS IN OHIO DEMONSTRATES CONCLUSIVELY THAT THEY CANNOT BE EXPLAINED ON THE BASIS OF RACE ALONE.

The Supreme Court has interpreted the "one person, one vote" principle to protect the collective rights of citizens to vote as a cohesive unit. *See Shaw v. Reno*, —— U.S. ——, ——, 113 S.Ct. 2816, 2823 (1993) (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)). As an outgrowth of the freedom of association in Article I, § 2 of the United States Constitution, the "one person, one vote" principle protects that cherished freedom to associate with others of like views, backgrounds or beliefs when bringing a united voice to the ballot box. Yet "equal protection" of the right to vote does not limit itself to the very public process of association through coalitional voting. "Equal protection" of voting rights if it means anything must protect the rights of the individual as well. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (state's conditioning of the right to vote on the payment of poll tax violates the Equal Protection Clause of the Fourteenth Amendment). *See also Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960) (redistricting of Tuskegee Alabama constituted an unlawful segregation of races of citizens in violation of the Equal Protection Clause of the Fourteenth Amendment) (Whittaker, J., concurring), *approved by Shaw v. Reno*, 113 S.Ct. at 2825-26; *Wright v. Rockefeller*, 376 U.S. 52 (1964) (Fourteenth and Fifteenth Amendment challenge to racial gerrymandering of a congressional district stated a constitutional claim, although plaintiffs failed

to meet their burden of proof at trial), *interpreted by Shaw v. Reno*, 113 S.Ct. at 2826.

Congress through the enactment of the Voting Rights Act has emphasized judicial protection of coalitional voting rights. As a result, courts have been quick to recognize that coalitional concepts such as vote dilution should be recognized as part and parcel of Fourteenth Amendment equal protection doctrine. Discussions of minority voting strength, racial bloc voting, cohesiveness, etc. became reflections of this aspect of equal protection. But these discussions of the coalitional protections guaranteed by the Fourteenth Amendment have at times overshadowed that aspect of the Amendment which guarantees the individual's voting rights. Courts faced with disparate precedent on the constitutional aspects of voting rights law have struggled to apply that law to particular cases. To a large extent those efforts have been successful. In part this may be due to the fact that as far as plaintiffs were concerned the rights of the individual and the rights of the group were not at odds. The equal protection concerns of the individual and the group to which that individual associated himself or herself were the same. This all changed with *Shaw v. Reno*, 113 S.Ct. 2816 (1993).

In *Shaw v. Reno*, individuals, who did not associate themselves with the group whose voting rights the state sought to protect, invoked the Fourteenth Amendment to invalidate the state's efforts to protect the coalitional voting rights of those others. The Court did not prohibit the state from acting to protect the coalitional voting rights guaranteed by equal protection. Instead it held that the state could not act to protect those coalitional voting principles by creating a voter eligibility classification—in this case by creating a classification through the use of the district system "so irrational on its face that it can be understood only as an effort to segregate voters . . . because of their race . . . ." 113 S.Ct. at 2832. By striking the balance between individual and coalitional Fourteenth Amendment rights in this way, the Court defined

the limits of a Fourteenth Amendment claim based on individual guarantees to equal protection. That the holding of *Shaw v. Reno* was limited to Fourteenth Amendment challenges to "bizarre" or "irrational" districts stems from the Court's recognition of the individual right at issue: the right not be segregated on the basis of race into bizarre or irrational districts when the state acts to protect the coalitional voting rights of others.

The nature of the individual right addressed by *Shaw v. Reno* is easily understood. At law, the "district" system can be understood as a type of voter eligibility classification theoretically indistinguishable from a poll tax, literacy test or residency requirement. *Compare Guinn v. United States*, 238 U.S. 347 (1915) (state use of literacy test and grandfather clause to determine one's eligibility to vote violates the Fifteenth Amendment). Each of these attributes—payment of the tax, the ability to read and write, or geographic domicile—constitutes a characteristic without which a vote cannot be cast. Likewise, in elections for representatives in a multimember legislative body, a voter who must vote under a district voting system cannot cast a ballot for the candidate of his or her choice if that candidate happens to be running in another district. Without the characteristic of residing within the district, a voter cannot cast a ballot. This is not the case in an at-large voting system. To the contrary, in an at-large system an otherwise qualified voter can cast a ballot for whatever candidates or slate of candidates choose to vie for a seat in the legislature, with only the top vote-getters being seated.[3] By enacting a district system instead of an at-large system, the state favors locality-based elections over ones which emphasize the majority interests of the larger political geography. In a district system it might

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[3] Of course where an election is held for a single political office such as with elections for a president, governor, mayor, or county executive, the district system and the at-large system are one in the same.

make sense for representatives to "bring home the bacon" as it were, while in an at-large system the interests of the overarching majority predominate. Thus, this locality-based voter eligibility classification expressed by the district system is an attribute of the law for which individual voters deserve equal protection. If the state acts to deprive an individual of equal protection of this law, then a remedy may be had through the Fourteenth Amendment.

As is the case of other voter eligibility classifications, however, the mere fact that the state selects one classification over another does not give rise to an equal protection claim. The mere proces of districting classifies voters. But that classification alone creates no constitutional violation. Moreover, the individual citizen *vis a vis* other individuals has no general right to be drawn into one district or to be drawn out of another. As long as the citizen is included in one district that is enough. Citizens as a group, however, do have a coalitional equal protection right to have certain of their associational interests protected in the line-drawing process. Thus, in general, the coalitional interests of the group predominate over the individual's interests and the state may engage in districting that recognizes those group interests. The difficulty comes with the realization that when the state drafts a district boundary to protect the coalitional interests of a group, the state simultaneously selects a voting classification for the individual based on that group interest. The line is drawn and the voter is classified. *Shaw v. Reno* stands for the proposition that where the line drawn is "so irrational on its face that it can be understood only as an effort to segregate voters . . . because of their race . . . ," 113 S.Ct. at 2832, then the state has crossed the line separating the proper from the improper state recognition of coalitional voting rights. In such a case the individual's equal protection right not to be subject to a voter eligibility classification designed to segregate the individual into a district based on race predominates

over the state's legitimate interest in protecting the coalitional voting rights of others.

The Court in *Shaw v. Reno* defined the line that separates the permissible from the impermissible state recognition of coalitional voting rights with its quotation of the opinion of Justice White, joined by Justices Stevens and Rehnquist, in *United Jewish Organizations v. Carey*, 430 U.S. 144, 168 (1977):

> "[W]e think it . . . permissible for a State, *employing sound districting principles such as compactness and population equality*, to attempt to prevent racial minorities from being repeatedly outvoted creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous *and whose residential patterns afford the opportunity* of creating districts in which they will be in the majority."

Shaw v. Reno, 113 S.Ct. at 2829 (quoting *UJO*, 430 U.S. at 168) (emphasis added).[4] This opinion of Justice White in *UJO* as endorsed by the majority in *Shaw v. Reno* defines the nature of a Fourteenth Amendment individual voting rights equal protection claim. Voting district classifications which group voters on the basis of race while adhering to the traditional districting principles

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[4] *Cf. also Karcher v. Daggett*, 462 U.S. 725, 740-44 (1982) (acknowledging that the state may vary from "one person, one vote" principles for "[a]ny number of consistently applied [nondiscriminatory] legislative policies . . . [including] making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives," and implicitly acknowledging that "preserving the voting strength of racial minority groups" might be one of those policies); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 583-84 (1990) (minorities have particular viewpoints worthy of protection in the effective exercise of their electoral franchise such that neither the Fourteenth nor the Fifteenth Amendments mandate any *per se* rule against using racial factors in districting and apportionment).

announced by Justice White in *UJO* must be challenged if at all based on the vote "dilution" principles embodied in such cases as *Rogers v. Lodge*, 458 U.S. 613 (1982) (at large election challenged under the Fourteenth and Fifteenth Amendments) and *Reynolds v. Simms*, 377 U.S. 533, 555 & n.29 (1964) (district reapportionment challenged under the Fourteenth Amendment).[5] When the state makes voting district classifications which do not adhere to traditional districting principles, then the use of districting by the state to protect coalitional interests by segregating voters on the basis of race states a claim for a prima facie violation of the Fourteenth Amendment. However, as demonstrated by the evidence in this case viewed in the light most favorable to the plaintiffs, such is not the case here. Consequently, the Court's reliance on *Shaw v. Reno* is misplaced.

The plaintiffs' claim that the reapportionment of the eight challenged house districts [6] constitutes racial gerry-

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[5] The Court expresses no opinion on whether failure to abide by these traditional districting principles when creating voter eligibility qualifications on bases other than race states a claim under the Fourteenth Amendment. *See generally Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) ("Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.").

[6] Although the majority opinion accepts the plaintiffs' assertion that they are challenging the entire Plan, not just these eight districts I find that the Second Amended Complaint cannot reasonably be read to challenge any more than the eight specified districts. Paragraph 56 of the Second Amended Complaint alleges that "[t]he districts which have been modified solely on the basis of race *include* House Districts 31, 30, 22, 21, 38, 39, 44 and 49." (emphasis added). Plaintiffs take the position that these eight districts are merely illustrative of the racially gerrymandered districts. However, if the entire Plan were really being challenged, there would be no need to state that the Plan "included" these districts. It is a given that the Plan includes *all* of the House Districts, these eight as well as those not specified. Furthermore,

mandering under *Shaw v. Reno* is devoid of proof. Once again, it is helpful to recall the advice of Bernard Grofman, a national expert on apportionment issues as they relate to minority interests: "One approach to eliminating or reducing gerrymandering is through statutory or state constitutional provisions that strictly implement formal criteria such as compactness, equal population, and maintenance of the integrity of political subunits." *Quilter v. Voinovich*, 794 F. Supp. 695, 704 (Dowd, J., dissenting).

The Ohio constitutional provisions mirror Grofman's advice. Moreover, the apportioning of Ohio has produced a system whereby blacks are successful in electing members of their race to the Ohio General Assembly in impressive numbers.

The plaintiffs' claim that the 1991 reapportionment of Ohio constitutes racial gerrymandering fails at the outset because the plaintiffs are unable to point to any house district in Ohio where the boundaries of the district can be explained solely on the basis of race. The only such attempt, i.e., to describe a district as "bizarrely drawn," was made by the plaintiffs' sole witness. Dr. Gordon Henderson pointed to the northwest portion of House District 38 as constituting a "moose head" or a "hand with two fingers showing." Henderson contended that the division of House Districts 38 and 39 with the so-called "moose head" was not explainable by the Ohio Constitution but was done to pick a significant number of black voters and put them in District 38. In fact, and as demonstrated by the defendants and not contested, the "moose head" followed the boundary lines of the City of Dayton as required by the Ohio Constitution.

¶ 55 of the Second Amended Complaint, which alleges that the defendants have drawn irregular districts "in numerous places throughout the state," further supports the interpretation that only certain districts are being challenged, not the entire Plan. Notwithstanding plaintiffs' present position, I would find that the Second Amended Complaint states a *Shaw v. Reno* claim only as regards the eight specified districts.

In my view, Amendment D, as it relates to the eight challenged districts before the Court, reflects adherence to traditional districting principles of compactness, contiguity and respect for the integrity of political subdivisions inherent in Article XI of the Ohio Constitution. Given the major population shifts which occurred during the last decade in the State of Ohio, most of the districts established in 1981 could not be retained under Article XI, § 7(D). Further, the requirements of Article XI, §§ 8, 9 and 10 take precedence over those of § 7(D) and preclude the retention of most of the 1981 districts.

It is also my view that the eight challenged districts are not "extremely irregular," "highly irregular," "so irrational" or "bizarre" as to be only attributable to race-based line-drawing for the purpose of segregating the races. Rather, they are regularly drawn, compact, contiguous and geographically cohesive as required by Article XI of the Ohio Constitution.

Since "irregularity" is a somewhat subjective matter, I find that even if one were to find irregularity in the boundaries of those districts, it can be explained with reference, to the boundaries of political subdivisions in conjunction with the populations of those various subdivisions. The split of certain communities results from the fact that these communities exist geographically in noncontiguous sections. In addition, in some instances, changes in the ward and precinct boundaries, coupled with changes in population, contribute to what some might judge to be "unusual" district boundaries.

Although there may have been other constitutionally-permissible ways of drawing these districts, the Board, by drawing them as it did, has not engaged in racial gerrymandering and has not violated the Equal Protection Clause of the United States Constitution.

Given the narrow construction and limited application of *Shaw v. Reno*, combined with absence of any demon-

strable evidence that the boundaries of the House Districts are so bizarre as to be explainable on the basis of race alone, the defendants are entitled to judgment on the plaintiffs' Equal Protection Claim because of a failure of proof on the part of the plaintiffs.[7]

III. THE PROOF OFFERED IN SUPPORT OF THE SECOND AMENDED COMPLAINT IS IN REALITY A THINLY DISGUISED ATTEMPT TO REVISIT THE DILUTION ISSUE ALREADY ADVERSELY DECIDED TO THE PLAINTIFFS BY THE SUPREME COURT'S DECISION.

As indicated in the brief submitted by the Justice Department, the plaintiffs' Second Amended Complaint presents a *Shaw v. Reno* claim "in only the most cursory manner." Moreover, as predicted by the Justice Department, the plaintiffs offered precious little evidence that the challenged house districts were so irregular that they were explainable solely in racial terms. To the contrary, and in keeping with the mandates of the Ohio Constitution, the legislative districts look quite regular and compact. In contrast to a *Shaw v. Reno* claim, which was offered as the basis for granting the motion to file the Second Amended Complaint, the testimony offered is a thinly disguised attempt to renew the dilution claim by offering it in a *Shaw* garment.

The Second Amended Complaint focused on eight House Districts for being so irregular as to be explained on race alone. The eight districts, as configured by Amendment D, are composed as follows, with the first number being the percentage of black population in each district and the second number being the percentage of black voting age population in that district:

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[7] The Court solicited an amicus brief from the Justice Department and that brief, in a more scholarly fashion than this dissent, arrives at the same conclusion.

1) House District 21 (Franklin County)—54.30% and 48.30%.

2) House District 22 (Franklin County)—44.68% and 40.98%.

3) House District 30 (Hamilton)—55.98% and 52.72%.

4) House District 31 (Hamilton)—49.16% and 43.13%.

5) House District 38 (Montgomery)—44.47% and 41.56%.

6) House District 39 (Montgomery)—40.69% and 36.71%.

7) House District 44 (Summit)—43.07% and 39.86%.

8) House District 49 (Lucas)—49.99% and 46.42%.

In only one of the challenged districts is there a majority of black voters. There is nothing in the challenged districts which remotely approaches the political apartheid fear which appears to be the motivating factor in *Shaw v. Reno,* 113 S.Ct. at 2827. In reality, the plaintiffs seek an expansion of *Shaw v. Reno* to include any reapportionment plan that is race-conscious and, in so doing, to expand the realm of judicial supervision to every reapportionment plan. Here, the plaintiffs wish to apportion the black voters not to insure the election of additional candidates of choice for blacks, as is the motive behind much of the Voting Rights litigation, but to have the black voters distributed in such a fashion that they will have maximum voting power. That is a dilution claim rather than a *Shaw v. Reno* claim. I dissent for the additional reason that the majority's opinion constitutes a renewed attempt to reapportion to maximize black voting

power, a remedy rejected by the Supreme Court in this case.

IV. ASSUMING ARGUENDO THAT PLAINTIFFS HAVE ESTABLISHED A PRIMA FACIE CASE OF AN EQUAL PROTECTION VIOLATION, THE PROOF OFFERED BY THE DEFENDANTS IN SUPPORT OF AMENDMENT D ENTITLES THE DEFENDANTS TO JUDGMENT UNDER A STRICT EVALUATION.

As my colleagues in the majority have concluded, under Equal Protection jurisprudence a reapportionment plan that classifies citizens on the basis of race, even though not explicitly, requires strict scrutiny; that is, the plan can be upheld only if it is narrowly tailored to further a compelling state interest. *Shaw v. Reno,* 113 S.Ct. at 2825. The Supreme Court made clear that even if a racial gerrymander is done for the "benign" purpose of enhancing minority voting strength, it must be reviewed with strict scrutiny. *Shaw v. Reno,* 113 S.Ct. at 2830.

The Supreme Court, however, did not identify the threshold level of racial consideration that is necessary before a redistricting plan is characterized as a racial gerrymander subject to strict scrutiny. The Court defined "racial gerrymandering" in redistricting as "the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes." *Shaw v. Reno,* 113 S.Ct. at 2823 (quoting *Davis v. Bandemer,* 478 U.S. 109, 164 (1986) (Powell, J., concurring in part and dissenting in part)). That definitions seems not particularly enlightening in view of the apparent conflict of meaning between "deliberate" and "arbitrary" actions. The majority has devoted a considerable amount of time trying to find in *Shaw*'s progeny an answer to the "trigger" question.[8] However,

[8] As the majority opinion has acknowledged, the *Shaw v. Reno* Court discussed the fact that, in the redistricting context, it is not

since fundamental rights are at stake here (i.e., voting rights and equal rights), I simply take the view that caution requires strict scrutiny.[9]

The eight challenged districts will withstand strict scrutiny if they were drawn to meet a compelling state interest and if they were narrowly tailored to accomplish that goal. The State of Ohio has a compelling interest in complying with Article XI of its Constitution,[10] requiring compact and contiguous districts which respect boundaries of political subdivisions. *See, Reynolds v. Sims*, 377 U.S.

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mere race "consciousness" or "awareness" which triggers strict scrutiny. This is true because, when drawing district lines, the legislature is always aware of race, as well as other factors such as age, religion, economic status, and politician persuasion. The Supreme Court's position is consistent with the long-recognized distinction between race-conscious, as opposed to race-based decisions. *See, e.g., Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (" 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences" but rather implies "action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

As discussed at some length in the majority opinion, different courts since *Shaw v. Reno* have adopted different triggering tests. *See, e.g., Johnson v. Miller*, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994), *probable jurisdiction noted*, 115 S.Ct. 713 (1995) (race the "substantial or motivating consideration"); *DeWitt v. Wilson*, 856 F. Supp., 1409, 1413 (E.D. Cal. 1994), *petition for cert. filed*, 63 U.S.L.W. 3127 (U.S. Aug. 8, 1994) (No. 94-275) (race "the sole criteria [sic]"); *Shaw v. Hunt*, 861 F. Supp. 408, 431 (E.D.N.C. 1994), *petition for cert. filed*, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (Nos. 94-923, 94-924) (" 'race-a-motivating-factor' triggering test").

[9] The notes of James R. Tilling strongly suggest that he purposefully considered race when he drew the house district boundaries reflected in Amendment D and challenged here. Since citizens were, at least in certain parts of the State, classified by race, the eight challenged districts arguably must be subjected to strict scrutiny.

[10] There is no argument advanced that Article XI is facially in violation of the Equal Protection Clause. The plaintiffs have not challenged the constitutionality of Article XI.

533, 578 (1964), cited in *Shaw v. Reno*, 113 S.Ct. at 2826, for the proposition that interests such as these are legitimate. *See also, Wright v. Rockefeller*, 376 U.S. 52 (1964) (where racial groups are highly concentrated in certain communities, districts which likewise concentrate those racial groups may reflect wholly legitimate purposes).

The State of Ohio also has the compelling state interest of complying with the Voting Rights Act.[11] As a matter of fact, at the time of the reapportionment under scrutiny here, the case of *Armour v. State of Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) had just made that clear. *Armour* was a challenge brought by black voters, after the 1981 reapportionment, claiming that the line drawn between two districts in Mahoning County split and diluted black voting strength in that community. *Armour* found that there *was* a history of discrimination against blacks such that blacks were deprived of an opportunity for effective participation in the democratic process. *Id.* at 1058-59. The court further found that there was racial bloc voting and that blacks were unable to elect candidates of their choice. *Id.* The *Armour* decision was issued on September 4, 1991, a mere month before the 1991 Reapportionment Plan was due. For that reason, the court did not order that the districts be redrawn. However, it did retain jurisdiction to see what would happen with the districts in the 1991 Plan.

The defendants here were without a doubt aware of the *Armour* decision which *required* the Board to consider race when drawing lines. In a strange twist, the defendants having done what they were effectively ordered to do by the *Armour* court, the majority now levels a charge of "race motivation." It seems there is no way to win and no clear guidance for persons in the defendants' position.

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[11] *See, United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 161-168 (1977) (plurality opinion); *id.* at 179-180 (Stewart, J., concurring in the judgment).

V. REMEDY.

The opinion of my colleagues declares that the apportionment of black voters in the eight legislative districts in Hamilton, Franklin, Montgomery, Summit and Lucas Counties is unconstitutional in the context of the Equal Protection Clause of the Fourteenth Amendment. However, the opinion fails to declare the contours of the remedy. Also, absent a remedial order, it would appear that there is no definitive judicial action from which the defendants could appeal. Assuming that the majority has not chosen to engage in rendering an advisory opinion, it would seem that the public officials charged with running the next election scheduled for 1996, the voters, and the potential candidates for the next election to the General Assembly, should be given some guidance on what happens next.[12] In addition, guidance is needed to reconcile the majority opinion with *Armour*. For example, under the teaching of *Armour*, it was acceptable to put 35% of the black voting age population into one district rather than split the blacks into two districts having 11% and 24% blacks, respectively. In *Armour*, that percentage of black voters was not considered packing and, in fact, was required to avoid minority vote dilution. In the instant case, where House District 39 in Montgomery County contains 36.71% black voting age population, the majority calls that impermissible "packing."

Presumably, the majority will eventually enter a Rule 54 final judgment and that judgment will undoubtedly delineate in considerable detail exactly what relief the plaintiffs are awarded. I also presume that the judgment entry will provide some guidance regarding deadlines and time lines in view of the upcoming primary and general

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[12] Since the 1996 Ohio Primary Election has been moved up to March 19, 1996, partisan candidates must declare their candidacy by no later than January 19, 1996. This time line could easily be put in jeopardy.

elections. I reserve the right to comment on any such judgment after it is entered.

VI. CONCLUSION.

In summary, I respectfully dissent for the following reasons:

1. A majority of this Court erred in granting the plaintiffs' motion to file a Second Amended Complaint which action was contrary to and in excess of the narrow limits of the remand from the Supreme Court.

2. The majority's expansive interpretation of the narrow teachings of *Shaw v. Reno,* if unchallenged, effectively converts the reapportionment process as mandated by the Ohio Constitution into a judicial exercise with no guidelines for the unprecedented exercise of federal judicial power.

3. In the event the opinion in *Shaw v. Reno* does provide, as my colleagues contend, that the state violates the Equal Protection Clause where race is a substantial and motivating factor in drawing boundary lines for reapportionment processes, the plaintiffs nevertheless have failed to prove that the race-conscious concerns of the majority members of the Ohio Reapportionment Board constituted a substantial and motivating factor in the drawing of the boundary lines for the eight challenged districts.

4. In the event the opinion in *Shaw v. Reno* does allow for, as my colleagues contend, the requirement that the state must demonstrate a compelling interest in the reapportionment of a legislative district where it is found that race was a substantial and motivating factor in the drawing of the boundary lines of the challenged district, I find that the state has demonstrated such a compelling interest, i.e., compliance with the Voting Rights Act and the provisions of the Ohio Constitution which deal with reapportionment.

5. The decision of the majority fails to establish, for the purpose of guidance, what constitutes "dilution" as opposed to "packing" in the distribution of black voters into districts in highly urbanized counties in Ohio consistent with the reapportionment mandates of the Ohio Constitution.

6. The majority opinion of the Court is devoid of guidelines to direct state officials in the reapportionment process so as to, on the one hand, avoid offending the Voting Rights Act as interpreted by the decision in *Armour v. State of Ohio* and, on the other hand, avoid offending the Equal Protection Clause of the Fourteenth Amendment given the pronouncements of the majority in this case which reject that "bizarrely-drawn lines" are a condition of proof to an equal protection claim.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX A

FINDINGS OF FACT

1. The 1991 Apportionment Board (the Board) consisted of defendants, Governor George V. Voinovich, Secretary of State Robert A. Taft, Jr., and Ohio Senate President Stanley J. Aronoff, and two of the plaintiffs, Auditor of State Thomas E. Ferguson and Speaker Pro Tempore of the Ohio House of Representatives Barney Quilter. (Report of James R. Tilling, p. 2) (Tilling Report).[a]

2. On August 22, 1991, the Board appointed defendant James R. Tilling (Tilling), the then Chief Executive Officer of the Ohio Senate, as its Secretary. (Tilling Report, p. 2).[b]

3. Tilling has a Bachelor of Science degree in Social Sciences from Clarkson University and a Masters Degree in Political Science from the University of Illinois, with a major in urban and metropolitan politics; in addition, he has completed course work toward a doctorate. He is a former professor of political science at Ohio University where he taught from 1969-1976. (Tilling Report, pp. 2-3). During the four years prior to the convening of the Board, Tilling served on the Task Force of the National Conference of State Legislators (NCSL), a bipartisan group of legislators, legislative staff, and members of other interested groups from all fifty states. (Transcript of Proceedings, November 17, 1994, Docket No. 312 [TR-2], p. 197; Tilling Report, p. 3).

4. Voinovich, Taft, and Aronoff directed Tilling to draft and submit an apportionment plan which complied with the Ohio Constitution, the United States Constitu-

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[a] A copy of the Tilling Report is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit A.

[b] Tilling was not himself a member of the Board. (Transcript of Proceedings, November 17, 1994, p. 274).

tion, and the Voting Rights Act, 42 U.S.C. § 1973, *et seq.* (TR-2, pp. 207-208). Pursuant to this authority, Tilling drafted the 1991 Apportionment Plan, including Amendment D. (Tilling Report, p. 2).

5. Tilling testified that by the Fall of 1990 he had developed a good understanding of the legal issues involved in re-districting and had become sensitized to those issues. (TR-2, p. 198). Among those issues was concern for the Fourteenth and Fifteenth Amendments to the United States Constitution, the Voting Rights Act and Ohio's constitutional requirements. (TR-2, p. 199).

6. Tilling testified that, in the course of his work on the NCSL Task Force, it was made clear to him by various groups representing minorities that the current interpretation of the Voting Rights Act was that, first, there should be no attempt to dilute minority voting strength and, second, every opportunity should be taken to increase minority voting strength. (TR-2, p. 201).

7. Article XI of the Ohio Constitution (Article XI or Art. XI) dictates the basic method for apportioning the State of Ohio for members of the General Assembly.[c]

8. The method for apportionment found in Article XI includes a framework not only for an orderly succession for apportionment (Art. XI, § 10), but also for principles of population equality (Art. XI, § 3), compactness, contiguity and geographical cohesion (Art. XI, § 7(A)), and respect for the boundaries of political subdivisions and communities of interest (Art. XI, §§ 7(B), 7(C), 8, 9 and 10).

9. The first requirement in the constitutionally-defined apportionment process is to determine the ideal population for a district by dividing the State's population by 99, the number of house seats. (Art. XI, § 2). In 1991, using

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[c] A true and correct copy of Article XI of the Ohio Constitution is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit G. (Joint Stip., Docket No. 305, ¶ 4).

the most recent federal decennial census information, that ideal mathematical number was 109,567. (Tilling Report, ¶ 6).

10. The Ohio Constitution specifies that the population of any house district cannot be less than 95% nor more than 105% of the ideal population number. (Art. XI, § 3). In 1991, that range in population was from 104,089 to 115,045. (Transcript of Proceedings, November 16, 1994 [TR-1], p. 78) (Docket No. 311).

11. The Ohio Constitution also requires that if a county, or part of a county, is not large enough to meet the population requirement of Section 3, the district must be formed by combining governmental units, giving preference in the following order: counties, townships, municipalities, and city wards. (Art. XI, § 7(B)).

12. Where a county or political subdivision is too large to comply with the Section 3 population requirement, the Ohio Constitution requires that the excess population be split off along geographical lines, giving preference in order as follows: township, city ward, city, and village. Where division is necessary, only one unit may be divided between two districts. (Art. XI, § 7(C)).

13. Article XI, § 10 provides the sequence for creating and numbering house districts. The first step is to designate the counties which are either mandatorily or permissively entitled to be constituted as single member districts. (Art. XI, §§ 10(A) and 10(B)). In 1991, four counties (Allen, Warren, Columbiana and Wood) were in the mandatory category and three counties (Ashtabula, Fairfield and Wayne) were in the permissive category. (Tilling Report, ¶¶ 12, 13). The majority of the Apportionment Board elected to designate Fairfield, Wayne and Ashtabula as single member districts.

14. The next step is to create districts out of whole counties, beginning with the county having the largest population, where obviously more than one house district

will be allocated, and fixing the boundaries for the appropriate number of house districts. In this process, the remaining territory in any county must be combined with adjoining territory outside the county before proceeding to combine the remaining territory of the state into representative districts.[d] (Art. XI, § 10(C)). After the apportionment is completed for the most populous county, then the process moves to the next most populous county and continues in that fashion until all counties entitled to more than a single district have been accommodated. In Ohio, which has 88 counties, a substantial majority of the house districts are contained in the 26 most populous counties. House Districts 8 through 81 were created in this manner. (Tilling Report, ¶ 14).

15. Once the process has been completed with respect to counties entitled to more than one district, the apportionment of the remainder of the State is accomplished by following the provisions of Article XI, Section 10(D). Under this provision, the 62 counties which had a 1990 population number less than 90% of the ideal number of 109,567 were combined with other counties to create House Districts 82 through 99. (Tilling Report, ¶ 16).

16. Amendment D, also referred to as the 1992 Plan, is the currently effective version of the Apportionment Plan. Amendment D was effective during the 1992 and 1994 Ohio elections. (Joint Stip., Docket No. 305, ¶ 3).[e]

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[d] For example, Cuyahoga County, the most populous county, is entitled to 12.88 districts. *Quilter v. Voinovich*, 794 F. Supp. 695, 705 (N.D. Ohio 1992). Twelve of those districts must be contained wholly within Cuyahoga County and the thirteenth district will, of necessity, spill over into an adjoining county. Selecting a portion of the county for "spill-over" is governed by Article XI, § 7(C).

[e] The original 1991 Apportionment Plan, as amended by Amendment C, has not been used in any election and is no longer the current plan.

17. The Ohio Supreme Court has previously held that the Plan complies with the requirements of Article XI. *Voinovich v. Ferguson*, 63 Ohio St. 3d 198, 586 N.E.2d 1020 (1992).[f]

18. Between 1980 and 1990, the total population of Ohio remained virtually the same, with the State gaining only 50,000 people. However, there were significant population shifts within the State; specifically, there was a shift from the Northeast quadrant to the Central and Southwest portions, particularly to Franklin, Delaware, Union and Madison Counties. There also occurred a shift from Cincinnati and Hamilton County to Butler, Clermont and Warren Counties. Cuyahoga County lost one entire house district in population (109,000 people), while Franklin County gained one entire house district. Franklin County replaced Hamilton County as the second most populous county of the State. There were also significant population shifts from the inner cities to the suburbs, as well as changes in municipal corporation, ward and precinct boundaries.[g] (Tilling Report, ¶ 42-43).

19. In Ohio, significant minority populations are concentrated in the major urban counties. These populations are geographically compact and contiguous. (Tilling Report, ¶ 61, 65).[h]

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[f] A copy of this opinion is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit D.

[g] Several counties experienced significant changes in wards, for example: Franklin County went from 58 wards to 74; Lucas County went from 24 wards to 23; and Summit County ward boundaries were changed dramatically. (Tilling Report, ¶ 51).

[h] Maps showing the 1990 census concentration of voting-age blacks in each of the counties where districts are challenged are found at Defendants' Supplemental Exhibits, Vol. I, Exhibit T (Franklin County, Districts 21 and 22); Exhibit V (Hamilton County, Districts 30 and 31); Exhibit X (Montgomery County, Districts 38 and 39); Exhibit Z (Summit County, District 44); and Exhibit BB (Lucas County, District 49).

20. The plaintiffs have leveled a challenge against the formation of House Districts 21, 22, 30, 31, 38, 39, 44 and 49.[i] All of these districts are located in Ohio's major urban counties. (Tilling Report, ¶ 63).

21. Handwritten notes made by Tilling in the process of drafting Amendment C to the 1991 Plan reflect his step by step thought process in the line drawing. (Tilling Notes).[j]

22. Plaintiffs have challenged House Districts 21 and 22 in Franklin County.[k]

23. As regards H.D. 21, Tilling's notes indicate that he would first "draw minority districts" and that he would "avoid primarily white Bexley and Whitehall." (Tilling Notes on H.D. 21).

24. As configured in Amendment D, H.D. 21 contains a population of 108,859 consisting of the following political subdivisions:

Franklin County, OH
02 Columbus City—

Fifty-sixth Ward—
Twenty-third Ward—

25096023A Precinct A
25096023B Precinct B
25096023E Precinct E
25096023G Precinct G
25096023H Precinct H

Twenty-fifth Ward—
Twelfth Ward—

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[i] *See*, note 4, in the dissenting opinion.

[j] A copy of the notes is found at Plaintiffs' Prior Proceeding Trial Exhibits, Vol. 2 of 4, Exhibit 120.

[k] A map of the Franklin County House Districts, including District 21 and District 22, is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit U. A map showing the political subdivision boundaries is found in the same Volume at Exhibit II.

Thirteenth Ward—
Sixteenth Ward—
Seventeenth Ward—
Twenty-sixth Ward—
Forty-first Ward—
Sixth Ward—
Seventh Ward—
Eighth Ward—

15 Clinton Township—
(No Wards)

25M020B121531 Clinton B

21 Mifflin Township—

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

25. As H.D. 21 is configured in Amendment D, blacks are 54.30% of the total population. The black voting age population of H.D. 21 is 48.30%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

26. H.D. 21 is bordered by H.D. 26 and H.D. 27 on the north, H.D. 23 on the west, H.D. 22 on the south, and HD 25 on the north and east.

27. The boundaries of H.D. 21 are partially coterminous with the boundaries of the City of Columbus, which boundaries resulted from irregular annexation.[1] Clinton Township, part of which is in H.D. 21, consists of geographically non-contiguous sections. (Tr-2, p. 225, 229-230; Tilling Report, ¶ 37c; Plaintiffs' Exhibit 1; Defendants' Supplemental Exhibit MM (Docket No. 319)). Ward 23, part of which is in H.D. 21, also consists of non-contiguous sections. (Tilling Report, ¶ 37c; Plaintiffs' Exhibit 1, Defendants' Supplemental Exhibit MM).

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[1] Tilling pointed out that what, to an outsider, might appear to be an "unusual" boundary is actually the result of Franklin county's having been "subjected to rampant annexations for at least the last 20 years." (TR-2, p. 225).

28. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 21, there being no challenger. (Defendants' Supplemental Exhibits, Vol. I, Exhibits GG and JJ).

29. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 21 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

30. As regards H.D. 22, Tilling's notes indicate that he would "create as close to a majority-minority district as possible" and "avoid Bexley and Whitehall, which are mostly white areas." (Tilling Notes on H.D. 22).

31. As configured in Amendment D, H.D. 22 contains a population of 110,848 consisting of the following political subdivisions:

Franklin County, OH
02 Columbus City—

First Ward—
Second Ward—
Thirty-fifth Ward—
Third Ward—
Fourth Ward—
Fiftieth Ward—
Fifty-first Ward—
Fifty-fifth Ward—
Fifth Ward—
Twenty-seventh Ward—
25096027A Precinct A
25096027B Precinct B
25096027C Precinct C
25096027F Precinct F
25096027G Precinct G
25096027H Precinct H
25096027I Precinct I
25096027J Precinct J

25096027K Precinct K
25096027M Precinct M

Twenty-eighth Ward—
Forty-fourth Ward—
Forty-seventh Ward—
Forty-eighth Ward—
Madison Township, Precinct 0—Portion on the inside of I-270

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

32. As H.D. 22 is configured in Amendment D, blacks are 44.68% of the total population. The black voting age population of H.D. 22 is 40.98%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

33. H.D. 22 is bordered by H.D. 21 on the north, H.D. 23 on the south and west, H.D. 24 on the south and east, and H.D 25 on the north and east.

34. Madison Township,[m] part of which is in H.D. 22, consists of geographically noncontiguous sections. (TR-2, p. 232; Tilling Report, ¶ 37c; Plaintiffs' Exhibit 1, Defendants' Supplemental Exhibit MM).

35. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 22 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I, Exhibits GG and JJ).

36. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 22 over another black candidate and a white candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

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[m] Plaintiffs' expert, Dr. Gordon Henderson, criticized this District for containing only one precinct of *Hamilton* Township. However, it appears to the me that this is an error and that Henderson intended to refer to the split of Madison Township. (TR-2, pp. 129-130).

37. Plaintiffs have challenged House Districts 30 and 31 in Hamilton County.[n]

38. As regards H.D. 30, Tilling's notes indicate that he would "start[] with majority-minority districts" and "includ[e] the greatest portion of the eastern segment of black population." (Tilling Notes on H.D. 30).

39. As configured in Amendment D, H.D. 30 contains a population of 108,885 consisting of the following political subdivisions:

Hamilton County, OH
03 Cincinnati City—

Thirteenth Ward—
Fifteenth Ward—
Seventh Ward—
Fourteenth Ward—
Second Ward—

3108652A Precinct A
3108652B Precinct B
3108652C Precinct C
3108652D Precinct D
3108652E Precinct E
3108652F Precinct F
3108652G Precinct G
3108652H Precinct H
3108652I Precinct I
3108652L Precinct L
3108652M Precinct M
3108652P Precinct P
3108652R Precinct R
3108652T Precinct T
3108652U Precinct U

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[n] A map of the Hamilton County House Districts, including District 30 and District 31, is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit W. A map showing the political subdivision boundaries is found in the same Volume at Exhibit II.

3108652V Precinct V
3108652W Precinct W

Third Ward—

15 St. Bernard City—
24 Columbia Township—
(No Wards)

31M020B Precinct B
31M020C Precinct C
31M020D Precinct D
31M020E Precinct E

27 Elmwood Township—
30 Golf Manor Township—
39 Springfield Township—
(No Wards)

31M075DD Precinct DD

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

40. As H.D. 30 is configured in Amendment D, blacks are 55.98% of the total population. The black voting age population of H.D. 30 is 52.72%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

41. H.D. 30 is bordered by H.D. 36 on the north and east, H.D. 31 and H.D. 21 on the west, and H.D. 37 on the south

42. In H.D. 30, Columbia and Springfield Townships both consist of geographically noncontiguous sections. (TR-2, p. 235; Tilling Report ¶ 37d; Plaintiffs' Exhibits 6 and 7; Defendants' Supplemental Exhibit NN).

43. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 30 over two white candidates. (Defendants' Supplemental Exhibits, Vol. I, Exhibits GG and JJ).

44. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed

in H.D. 30 over another black candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

45. As regards H.D. 31, Tilling's notes indicate that he would "draw [a] second majority-minority district, using areas of black population." (Tilling Notes on H.D. 30).

46. As configured in Amendment D, H.D. 31 contains a population of 105,573 consisting of the following political subdivisions:

Hamilton County, OH
03 Cincinnati City—

Twenty-third Ward—
Twenty-second Ward—
Tenth Ward—
Eleventh Ward—
Twelfth Ward—
Sixteenth Ward—
Seventeenth Ward—
Eighteenth Ward—
Sixth Ward—
Eighth Ward—
Ninth Ward—

39 Springfield Township—
(No Wards)

31M075L Precinct L

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

47. As H.D. 31 is configured in Amendment D, blacks are 49.16% of the total population. The black voting age population of H.D. 31 is 43.13%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

48. H.D. 31 is bordered by H.D. 35 on the north, H.D. 33 and H.D. 34 on the west, and H.D. 30, HD 32, and HD. 37 on the east.

49. Springfield Township, partially in H.D. 31, consists of geographically noncontiguous sections. (TR-2, p. 234-235; Plaintiffs' Exhibits 6 and 7; Defendants' Supplemental Exhibit NN).

50. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 31 over two white candidates. (Defendants' Supplemental Exhibits, Vol. I, Exhibits GG and JJ).

51. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 31 over another black candidate and a white candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

52. Plaintiffs have challenged House Districts 38 and 39 in Montgomery County.°

53. As regards H.D. 38, Tilling's notes state that he would create a "majority-minority district[.]" (Tilling Notes on H.D. 38).

54. As configured in Amendment D, H.D. 38 contains a population of 106,899 consisting of the following political subdivisions:

Montgomery County, OH
02 Dayton City—
Tenth Ward—
Eleventh Ward—
First Ward—
Fifth Ward—

5711105A Precinct A
5711105B Precinct B
5711105D Precinct D
5711105F Precinct F

° A map of the Montgomery County House Districts, including District 38 and District 39, is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit Y. A map showing the political subdivision boundaries is found in the same Volume at Exhibit II.

5711105G Precinct G
5711105I Precinct I

Sixth Ward—
Seventh Ward—
Eighth Ward—
Twelfth Ward—
Thirteenth Ward—
Fourteenth Ward—
Fifteenth Ward—

57111015A Precinct A
57111015B Precinct B
57111015C Precinct C
57111015D Precinct D
57111015E Precinct E
57111015F Precinct F
57111015G Precinct G
57111015H030537 Precinct H
57111015H030636 Precinct H
57111015I030636 Precinct I

Nineteenth Ward—
Twentieth Ward—

18 Jefferson Township

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

55. As H.D. 38 is configured in Amendment D, blacks are 44.47% of the total population. The black voting age population of H.D. 38 is 41.56%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

56. H.D. 38 is bordered by H.D. 39 on the north and east, H.D. 40 on the west, H.D. 41 on the south, and H.D. 42 on the east.

57. In H.D. 38, the boundary lines are partially coterminous with the municipal boundaries of the City of Dayton. (Tr-2, p. 238; Tilling Report, ¶ 37e; Plaintiffs' Exhibit 2).

58. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 38 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I, Exhibits GG and JJ).

59. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 38 over another black candidate and a white candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

60. As regards H.D. 39, Tilling's notes state that he would "create an influence district with the highest possible minority vote" and that he would "[t]ake in Madison [Township], Trotwood, [and] portions of Harrison [Township]." (Tilling Notes on H.D. 39)).

61. As configured in Amendment D, H.D. 39 contains a population of 107,079 consisting of the following political subdivisions:

Montgomery County, OH
02 Dayton City—
Third Ward—

5711103A Precinct A
5711103B030539 Precinct B
5711103C Precinct C
5711103D Precinct D
5711103E Precinct E
5711103F030540 Precinct F
5711103F030639 Precinct F
5711103G Precinct G
5711103H Precinct H
5711103I Precinct I
5711103J Precinct J
5711103K Precinct K
5711103L Precinct L
5711103M Precinct M
5711103N030540 Precinct N
5711103N030639 Precinct N

5711103O Precinct O
5711103P Precinct P

Fourth Ward—
Fifth Ward—

5711105C Precinct C
5711105E Precinct E
5711105H Precinct H

Fifteenth Ward—

57111015I030537 Precinct I

Sixteenth Ward—
Seventeenth Ward—
Eighteenth Ward—
Twenty-first Ward—
Twenty-second Ward—

10 Trotwood City—
19 Madison Township—
20 Mad River Township—
(No Wards)

57M045B Precinct B
57M045E Precinct E
57M045F Precinct F
57M045K Precinct K
57M045S Precinct S
57M045T Precinct T
57M045U Precinct U
57M045W Precinct W

Harrison Township, Precinct C—Only the non-contiguous portion to East

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

62. As H.D. 39 is configured in Amendment D, blacks are 40.69% of the total population. The black voting age population of H.D. 39 is 36.71%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

63. H.D. 39 is bordered by H.D. 43 on the north, H.D. 40 on the north and west, and H.D. 38 and H.D. 42 on the south.

64. Some wards in H.D. 39 exist as non-contiguous portions of the City of Dayton. (TR-2, pp. 239-240; Tilling Report ¶ 37e; Plaintiffs' Exhibit 2).

65. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 39 over another black candidate. (Defendants' Supplemental Exhibits, Vol. I, Exhibits GG and JJ).

66. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 39 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

67. Plaintiffs have challenged House District 44 in Summit County.[p]

68. As regards H.D. 44, Tilling's notes indicate that he would "try to maximize the minority voters in [Representative Vernon Sykes'] district," including the "city of Akron, Wards 2, 3, 5 and parts of 1, 4, and 10." (Tilling Notes on H.D. 44).

69. As configured in Amendment D, H.D. 44 contains a population of 104,538 consisting of the following political subdivisions:

Summit County, OH
01 Akron City—
Tenth Ward—
First Ward—

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[p] A map of the Summit County Districts, including District 44, is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit AA. A map showing the political subdivision boundaries is found in the same Volume at Exhibit II.

7700351A Precinct A
7700351B Precinct B
7700351C Precinct C
7700351D Precinct D
7700351E Precinct E
7700351G Precinct G
7700351H Precinct H
7700351I Precinct I
7700351L Precinct L
7700351M Precinct M
7700351O Precinct O
7700351P42 Precinct P
7700351P44 Precinct P
7700351Q Precinct Q
7700351R Precinct R
7700351S Precinct S
7700351T Precinct T
7700351U Precinct U
7700351V Precinct V
7700351W Precinct W
7700351X Precinct X
7700351Y42 Precinct Y
7700351Y44 Precinct Y

Second Ward—
Third Ward—
Fourth Ward—

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

70. As H.D. 44 is configured in Amendment D, blacks are 43.07% of the total population. The black voting age population of H.D. 44 is 39.86%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

71. H.D. 44 is bordered by H.D. 46 on the north, H.D. 45 on the west, H.D. 47 on the south, and H.D. 48 on the east.

72. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat pre-

vailed in H.D. 44 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I, Exhibits GG and JJ).

73. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 44 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

74. Plaintiffs have challenged House District 49 in Lucas County.[q]

75. As regards H.D. 49, Tilling's notes state that he would "[d]raw minority district first, based upon minority population distribution display" and that he would "follow[] the black population concentration to Ward 6 [and] . . . then . . . add Hispanic voters." (Tilling Notes on H.D. 49).

76. As configured in Amendment D, H.D. 49 contains a population of 105,798 consisting of the following political subdivisions:

Lucas County, OH
04 Toledo City—
Second Ward—

4842652K Precinct K
4842652L Precinct L

Fourth Ward—
Sixth Ward—
Tenth Ward—
Eighth Ward—
Thirteenth Ward—
Fourteenth Ward—
Seventeenth Ward—

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

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[q] A map of the Lucas County House Districts, including District 49, is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit CC. A map showing the political subdivision boundaries is found in the same Volume at Exhibit II.

77. As H.D. 49 is configured in Amendment D, blacks are 49.99% of the total population. The black voting age population of H.D. 49 is 46.42%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

78. H.D. 49 is bordered by H.D. 50 on the north and east, and H.D. 52 on the south and west.

79. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 49 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I, Exhibits GG and JJ).

80. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 49 over another black candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

81. Given the percentage of black population in the eight challenged districts, i.e., 54.30% (H.D. 21), 44.68% (H.D. 22), 55.98% (H.D. 30), 49.16% (H.D. 31), 44.47% (H.D. 38), 40.69% (H.D. 39), 43.07% (H.D. 44), and 49.99% (H.D. 49), the average percentage of black population in those districts is 47.79%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

82. Given the percentage of black voting age population in the eight challenged districts, i.e., 48.30% (H.D. 21), 40.98% (H.D. 22), 52.72% (H.D. 30), 43.13% (H.D. 31), 41.56% (H.D. 38), 36.71% (H.D. 39), 39.86% (H.D. 44), and 46.42% (H.D. 49), the average percentage of black voting age population in those districts is 43.71%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

83. There was one more minority representative and one more minority senator elected in 1992 under Amendment D than had last been elected under the 1981 Apportionment Plan, for a total of fifteen, as compared to thirteen, minority legislators. (TR-2, p. 256).

84. In the 1994 election, the same number of minority representatives was elected plus one additional senator, for a total of sixteen minority legislators. (TR-2, p. 260).

APPENDIX B

[Filed May 9, 1995]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

vs.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

CIRCUIT JUDGE NATHANIEL JONES
CIRCUIT JUDGE ANTHONY CELEBREZZE
DISTRICT JUDGE DAVID D. DOWD, JR.

ORDER

Pursuant to the decision of the majority of this court filed on April 28, 1995 which directs the defendants to redraft House Districts 21, 22, 30, 31, 38, 39, 44 and 49, and preparatory to filing a Rule 54 Judgment Entry, the parties are invited to submit by May 31, 1995 proposed remedies for the purpose of implementing the decision on a time line that would accommodate the schedule for the conducting of the 1996 Ohio Primary elections.

IT IS SO ORDERED.

For the Court

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.

APPENDIX C

[Filed May 26, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,
v.
GEORGE V. VOINOVICH, *et al.*,
Defendants.

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE, SR.
JUDGE DAVID D. DOWD, JR.

OPINION

The question before this court is whether the Ohio Apportionment Board's consideration of race in its 1992 redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. We hold that by virtue of demonstrated white and African American coalitional voting for legislative seats in Ohio, and the failure of Defendants to demonstrate a compelling state interest in using race in drawing legislative lines, certain districts in the 1992 plan are unconstitutional.

I. Background and Procedural History

Pursuant to the Ohio Constitution, the State Apportionment Board, comprised of five members, must reapportion State House and Senate electoral districts for the

state legislature every ten years.[1] Following the 1990 federal census, a majority of the Apportionment Board[2] appointed James R. Tilling to draft an apportionment plan on behalf of the Board. After conducting public hearings throughout the state, including meeting with some members of minority organizations, Tilling drafted a plan that included eight majority-minority districts, districts in which a majority of the population is a member of a specific minority group. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1153 (1993). On October 1, 1991, the Apportionment Board adopted the plan Tilling submitted by a 3-2 vote along party lines. *Id.* The three Republican members voted for the plan, and the two Democrats voted against it. The Board later reconvened on October 3, 1991, to make several technical amendments to the plan,

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[1] Article XI, Section I of the Constitution of the State of Ohio provides:

> The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.
>
> Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year [1971] and every tenth year thereafter.

Ohio Const., art. XI, § 1.

[2] The majority consisted of Defendants George V. Voinovich, Governor of the State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Robert A. Taft, II, Secretary of State of Ohio. In the minority were Plaintiffs Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, and Thomas E. Ferguson, Auditor of the State of Ohio.

and the plan, adopted on October 3, 1991, in the wake of these changes, was designated "Amendment C."

On November 1, 1991, Barney Quilter and Thomas Ferguson, the two Democrats on the Board who voted against the plan, and various Democratic party officials and legislators filed suit against the Republican members of the Apportionment Board and Tilling.[3] Seeking invalidation of the plan, the Plaintiffs alleged that the redistricting plan violated section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution, which provided specific apportionment guidelines. *Voinovich v. Quilter*, 794 F. Supp. 695, 695-96 (N.D. Ohio 1992). According to the Plaintiffs, the Defendants intentionally "packed minorities into certain districts where minorities historically were able to elect representatives of choice with crossover votes." *Id.* at 698. The Plaintiffs contended that this packing resulted in a waste of minority votes in the packed districts and a dilution of minority voting strength in the surrounding areas where the "packed" voters could influence elections. *Id.* In response, the Defendants contended that the plan actually enhanced the strength of black voters by creating safe, minority-dominated districts. As justification for these changes, the Defendants cited compliance with the Voting

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[3] The dissent claims that the Plaintiffs commenced this litigation "to wrest control of Ohio's reapportionment process from the majority of the Board and place it with the federal court system." Dissenting Op. at [2]. Obviously, such a charge could be leveled against any entity that chooses to challenge a state's infringement of its federal statutory or constitutional rights because it is one of the means to bring such a challenge. Nevertheless, this was not the end or purpose for which the Plaintiffs filed their claim. The Plaintiffs sought a reapportionment plan that was not racially discriminatory, and in filing suit with the federal court, they were simply utilizing the best means to accomplish that end.

Rights Act and federal case law, which allegedly mandated the drawing of majority-minority districts. *Id.*

On January 31, 1992, a majority of this three judge panel held that there was "no legal mandate or finding of a Voting Rights Act violation to justify Defendants' creation of majority-minority districts wherever possible in the 1991 apportionment plan." *Id.* at 701. Thus, we ordered the Board to draft a new plan or demonstrate that it was remedying a section 2 violation.[4] *Id.* at 702.

The Apportionment Board responded by establishing and adopting a record on February 18, 1992, that, in its view, justified the Board's creation of minority-controlled state legislative districts. Furthermore at its February 18 meeting, the Board amended the 1991 plan to eliminate a series of technical errors in the plan that the Ohio Supreme Court had identified in its separate review of the plan, *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992). The resulting 1992 plan, "Amendment D," created only five majority-minority districts, however, a reduction from the eight majority-minority districts in the 1991 plan, "Amendment C."

On March 10, 1992, after the Board submitted its findings and conclusions, along with the new 1992 plan, this court held that the Board "fail[ed] once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992). Furthermore, this court held that the 1992 plan also violated the Fifteenth

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[4] We declined to address the Plaintiffs' constitutional claims at this point because our analysis under the Voting Rights Act required the plan to be justified or revised. Likewise, because the Ohio Supreme Court, in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992), was concurrently considering the Plaintiffs' claim under the Ohio Constitution, we abstained from addressing the pendant claim.

Amendment of the United States Constitution. *Id.* Nine days later, in response to Defendants' motion for a stay of the March 10 order pending appeal to the United States Supreme Court, this court additionally held that both the 1991 and 1992 plans violated the Fourteenth Amendment because they departed from the requirement that all districts be of nearly equal population. *Quilter v. Voinovich,* No. 5:91CV-2219, 1992 WL 677145, at *10 (N.D. Ohio Mar. 19, 1992).

The Defendants appealed to the United States Supreme Court. In *Voinovich v. Quilter,* 113 S. Ct. 1149 (1993), the Supreme Court reversed this court's *Quilter* decisions. Denying two of the Plaintiffs' claims, the Court held that the reapportionment plan at issue did not violate section 2 of the Voting Rights Act, nor did it violate the Fifteenth Amendment to the United States Constitution. Nevertheless, the Court held that the Plaintiffs had established a *prima facie* case that the population deviations between the districts violated the Equal Protection Clause, and the Court remanded "only for further proceedings on whether the plan's deviation from equal population among districts violate[d] the Fourteenth Amendment." *Id.* at 1154.

Upon remand, we held that the Ohio reapportionment plan survived scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the Defendants advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts, (2) their plan reasonably furthered the rational state policy, and (3) the 13.81% and 10.54% total deviations fell within constitutional limits. *Quilter v. Voinovich,* 857 F. Supp. 579, 587 (N.D. Ohio 1994). Accordingly, judgment was entered for the Defendants on this issue.

While the latter decision was pending, however, the Plaintiffs moved this court for permission to amend their complaint in light of the Supreme Court's recent decision

in *Shaw v. Reno*, 113 S. Ct. 2816 (1993).[5] As a lower court, we are bound of course, regardless of the strength of our reservations,[6] to follow the Supreme Court's decision in *Reno*, where the Court held for the first time that a plaintiff could state a claim under the Equal Protection Clause by alleging that a districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 2828. We granted the Plaintiffs' motion,[7] and their complaint was

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[5] In dissent, our colleague argues that the Plaintiffs were actually bringing another vote dilution claim rather than a *Shaw v. Reno* claim. Dissenting Op. at [16]. Actually, however, this case is simply a classic example that the same set of facts or circumstances may give rise to more than one cause of action. The Supreme Court clearly denied the Plaintiffs' vote dilution claim under section 2 of the Voting Rights Act, but the Court did not address whether the Apportionment Board's use of race in redistricting, ostensibly as a remedial measure pursuant to the Voting Rights Act, violated the Equal Protection Clause of the Fourteenth Amendment. *See Quilter*, 113 S. Ct. at 1157. The Plaintiffs have brought the latter challenge in the instant case.

[6] We note that critics of the Court's decision in *Shaw* have raised compelling concerns with which we sympathize. *See* A. Leon Higginbotham, Jr., et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Review 1593 (1994); Brief of the Congressional Black Caucus as *Amicus Curiae* in Support of Appellants, *United States v. Hays*, Nos. 94-558/627 (U.S., *cert. granted* Dec. 12, 1995).

[7] In dissent, our colleague renews his disagreement with our prior decision to allow the Plaintiffs to amend their Complaint and bring a *Shaw v. Reno* challenge to the reapportionment plan. Dissenting Op. at [4-5]. The dissent alleges that our decision violated the mandate rule by exceeding the scope of the remand, and he claims that review of a *Shaw* claim actually "required a new lawsuit and a new draw, with a probable different three-judge panel." *Id.*

In our prior decision, we clarified that "while a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Quilter v. Voinovich*, 157 F.R.D. 36, 38-39 (N.D. Ohio 1994) (quoting *Quern v. Jordan*, 440 U.S.

accordingly amended.[8] *Quilter v. Voinovich*, 157 F.R.D. 36, 40 (N.D. Ohio 1994).

332, 347 n.18 (1979) (quotation omitted)). Under the mandate rule, we may not consider on remand the issues that the Supreme Court decided, but we may consider issues that have not been decided. *See id.* at 39 (citing *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.), *cert. denied*, 113 S. Ct. 125 (1992); *see id.* at 39 n.1 (citing cases from other circuits holding the same). In this case, the Supreme Court expressly abstained from considering the type of Equal Protection Clause challenge delineated in *Shaw*. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993). Thus, the Court's mandate did not prohibit us from considering the issue on remand.

To support the contention that the Plaintiffs' *Shaw* claim required a new lawsuit, new draw, etc., the dissent cites to some Local Rules that give direction with respect to the appropriate disposition of related cases that are filed separately. *See* Dissenting Op. at [5 n.2]. Yet, these Local Rules would only apply if Plaintiffs had filed a new lawsuit alleging a *Shaw* claim. As such these Local Rules do not support the proposition that the Plaintiffs were "required to file a new lawsuit." Indeed, the dissent offers no supporting authority for this proposition, other than the case law cited in conjunction with the previous argument.

[8] The Plaintiffs' Second Amended Complaint revised the First Amended Complaint in only two respects. First, Count IV, entitled "Violation of the Equal Protection Clause—Segregation of Voters by Race Without Compelling Governmental Justification," is added. Second, the prayer for relief was accordingly revised. In pertinent part, Count IV alleges the following:

> 52. . . . The reapportionment plan adopted by the Defendants on February 18, 1992 intentionally separated Ohio voters on the basis of race without regard for the traditional redistricting principles set forth in the Ohio Constitution and otherwise without any compelling governmental justification. To justify the creation of race-based districts in the urban centers of Ohio, Defendants asserted that there was widespread racial bloc voting throughout Ohio. The trial court specifically found, and the Supreme Court of the United States confirmed, that Ohio did not suffer from legally cognizable racially polarized voting. . . .
>
> 53. The Defendants deliberately created race-based legislative districts in urban centers initially and then used the purported, but sham, necessity of creating such districts as the basis for ignoring the traditional anti-gerrymandering

Having considered the record evidence and the arguments of the parties, both written and oral, we are prepared to issue our decision.[9] We preface our findings of fact and conclusions of law, however, with a discussion of the governing law that provides the analytical paradigm for our conclusions.

II. First Principles

A. *Nature of a Shaw v. Reno Claim*

Prior to the Supreme Court's decision in *Reno*, the Court had delineated only two legal theories to support

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provisions of the Ohio Constitution throughout the state of Ohio. Absent the ripple effect of the racial gerrymandering in the urban centers of the state of Ohio, the Defendants would not have been forced to ignore on a wholesale basis the directives of Article XI, Section 7, of the Ohio Constitution to follow existing political and legislative boundaries wherever possible.

54. . . . The decision to abandon the traditional districting mandates contained within the Ohio Constitution is neither compelled by the doctrine of federal supremacy, nor based on any lawful, organized, or rational districting criteria. . . .

55. The Defendants have articulated no compelling governmental interest for the wholesale abandonment of the provisions of the Ohio Constitution. As a result, the Defendants have drawn irregular districts in numerous places throughout the state, districts which have no explanation other than the ripple effects caused by the racially drawn districts in the urban centers. In some instances, the racially drawn districts themselves have irregular shapes not required by the Ohio Constitution.

56. The districts which have been modified solely on the basis of race include House Districts 31, 30, 22, 21, 38, 39, 44, and 49. No evidence has been presented to the trial court that either legally cognizable remedial action was necessary to draw these racially gerrymandered districts, or that the creation of such districts was narrowly tailored to further any compelling government need.

Pls' Second Am. Compl. ¶¶ 52-56.

[9] The court also appreciated and considered an *amicus* brief submitted by the United States Department of Justice, which supported the position of the Defendants.

a redistricting challenge under the Equal Protection Clause of the Fourteenth Amendment: (1) violation of the "one-person-one-vote" principle, which requires that districts be equal in population so that the votes cast by voters in one district do not have less weight than those cast by voters in other districts, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); and (2) a claim of vote dilution, whereby districts are purposefully drawn to unfairly dilute or diminish the voting strength of an identified group of voters, *Rodgers v. Lodge*, 458 U.S. 613 (1982). *Shaw v. Hunt*, 861 F. Supp. 408, 421 (E.D.N.C. 1994), *petition for cert. filed*, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (No. 94-923); *see also Reno*, 113 S. Ct. at 2822, 2823, 2828. Under both theories, the Court found that redistricting schemes violated the Equal Protection Clause of the Fourteenth Amendment only when they caused *material harm* to the voting strength of an identifiable group of citizens. *Hunt*, 861 F. Supp. at 422; *see, e.g., Rodgers v. Lodge*, 458 U.S. 613, 616-17 (1982) (noting that redistricting plan violates Fourteenth Amendment when it is adopted with a discriminatory *purpose* and has *effect* of diluting minority voting strength). The Supreme Court had never held that a plaintiff could challenge a redistricting plan solely because it impermissibly took race into account in drawing district lines; the Court had required not only a showing of discriminatory purpose but also specific discriminatory effect, a concrete material harm, to state a valid claim under the Fourteenth Amendment.

In *Shaw v. Reno*, however, the Court announced a third means to challenge legislative redistricting under the Equal Protection Clause. The Court held that "a plaintiff challenging a reapportionment [plan] under the Equal Protection Clause may state a claim by alleging that the [plan], though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 113 S. Ct. at 2828. In essence, the Court was saying that a

plaintiff no longer had to allege discriminatory effect or material harm in conjunction with discriminatory purpose to state a valid equal protection claim, if the redistricting plan contained districts, whose composition rationally could be understood only as a deliberate effort to segregate voters on the basis of race—a racial gerrymander, *id.* at 2823 (defining a racial gerrymander as the deliberate and arbitrary distortion of district boundaries for racial purposes).[10]

The Court declared that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Id.* at 2824 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), and they "may serve to stimulate our society's latent race-consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs," *United Jewish Organizations v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part).

Because a racial gerrymander is just as invidious as any other law that classifies people on the basis of their race, the Court in *Reno* held that race-based redistricting demands the same level of scrutiny, that is, strict scrutiny: a race-based redistricting plan can be upheld only if it is narrowly tailored to further a compelling state interest. 113 S. Ct. at 2825, 2826, 2830; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429

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[10] The dissent does not find the Supreme Court's definition of racial gerrymandering "particularly enlightening in view of the apparent conflict of meaning between 'deliberate' and 'arbitrary' actions." Dissenting Op. at [17]. Evidently, the dissent has never recognized that someone deliberately can act in an arbitrary manner.

U.S. 252, 266 (1977) (noting that strict scrutiny applies not only to legislation that contains explicit racial classifications but also to those "rare" statutes that are "unexplainable on grounds other than race," even though they are race-neutral on their face). Consistent with prior practice, the Court made clear that because a racial gerrymander is a racial classification, it must be reviewed with strict scrutiny even if the drafters of the redistricting plan claim that the plan was drawn with the "benign" purpose of enhancing minority voting strength, 113 S. Ct. at 2830 ("Equal Protection Clause demands strict scrutiny of all racial classifications . . . because without it, a court cannot determine whether or not the discrimination truly is "benign."); *id.* at 2826 ("[D]istrict lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."), or claim that the racial gerrymander benefits or burdens the races equally, *id.* at 2829 (citing *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 1370 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.").

We believe that the Court's decision in *Reno* to apply strict scrutiny to a race-based apportionment plan is congruous with the Court's Equal Protection Clause analysis in other contexts where the use of racial classifications has been justified as a remedial measure or affirmative action. See City *of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (government contracting and minority set-asides); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (public employment); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (admission to public medical school). As such, *Reno* is applicable to this case because the evidence reveals that the Defendants drew certain districts in the 1992 plan to enhance the voting strength of minority voters, ostensibly with remedial purposes in mind. *See* discussion *infra* part III; *see*

also Defs.' Post Trial Br. at 60 (stating that if this court finds strict scrutiny should be applied to the 1992 plan, the Apportionment Board had enough evidence to conclude that *remedial* action was necessary to comply with section 2 of the Voting Rights Act).

Although the Court in *Reno* clearly created a new means to challenge state apportionment plans pursuant to the Fourteenth Amendment, its analysis left many unanswered questions that are integral to the proper resolution of a *Shaw v. Reno* claim: (1) To what extent must "race" be a factor in an apportionment plan before the plan becomes a racial gerrymander subject strict scrutiny analysis?; (2) Is circumstantial evidence of "bizarre" district shapes necessary to state and sustain a *Shaw v. Reno* claim?; (3) Once strict scrutiny is triggered, who has the burden of proof in a *Reno* claim?; (4) What constitutes a "compelling state interest" that would justify race-based redistricting?; and (5) What is the meaning of "narrowly tailored" in the redistricting context? We turn now to consider these issues.

B. *The Trigger for Strict Scrutiny*

The Court in *Reno* did not specify the threshold showing of racial consideration that was necessary to establish that a redistricting plan was a racial gerrymander, subject to strict scrutiny. The Court did, however, narrow the spectrum by significantly reiterating the principle that "awareness" of race or "race consciousness" in the districting process is not equivalent to a racial gerrymander that requires strict scrutiny analysis:

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

113 S. Ct. at 2826 (emphasis in original). This proposition is not novel, however, because the Court's equal protection cases "have long recognized that there is a critical distinction between 'race-conscious' action and 'race-based' action, and that the 'intentional' use of race required to trigger strict scrutiny of legislative action cannot be established simply by showing that the legislature adopted a particular course of action with knowledge that it was likely to have a particular racial impact. *Hunt*, 861 F. Supp. at 433 (citing *Personnel Adm. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (noting that the sort of "discriminatory purpose" required to trigger strict scrutiny of a statute that is facially race-neutral "implies more than intent as volition or intent as awareness of consequences"; it necessitates evidence revealing "that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its . . . effects upon an identifiable group")). Thus, in the redistricting context, the level of racial consideration or racial intent that is necessary to trigger strict scrutiny under *Reno* is more than "just taking action with the knowledge or awareness that it is likely to have a particular racial impact, but taking it with the *specific intent* to bring about such an impact." *Id.; Reno*, 113 S. Ct. at 2823 (noting that a racial gerrymander is "the *deliberate* and arbitrary distortion of district boundaries . . . for [*racial*] *purposes*") (emphasis added)).

Because we believe that the Supreme Court in *Reno* "intended to place race-based redistricting legislation into the same category as all other forms of race-based state action after *Croson*, for purposes of analysis under the Equal Protection Clause," *Hunt*, 861 F. Supp. at 429, we find that strict scrutiny of a redistricting plan is now triggered if "racial considerations played a 'substantial' or 'motivating' role in the line drawing process, even if they were not the only factor that influenced that process," *id.* at 431, and even if the state's use of race "can be said to have a 'benign' or 'remedial' purpose," *id.* at 431. *See*

Hays v. Louisiana, 839 F. Supp. 1188, 1202, 1214, 1216 (W.D. La. 1993) ("*Hays I*") (majority and concurring opinion), *vacated and remanded for reconsideration due to change in law*, 114 S.Ct. 2731 (1994), *on remand*, *Hays v. Louisiana*, 862 F. Supp. 119 (W.D. La. 1994) ("*Hays II*"), *cert. granted sub nom., United States v. Hays*, 115 S. Ct. 687 (1994); *see also Arlington Heights*, 429 U.S. at 265-66 ("When there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified."). The *Hunt* court described the level of racial consideration necessary to trigger strict scrutiny as follows:

> This "race-a-motivating-factor" triggering test is necessarily met by proof that the plan's lines were deliberately drawn so as to create one or more districts in which a particular racial group is a majority, even if factors other than race are shown to have played a significant role in the precise location and shape of those districts. If the line drawing process is shown to have been infected by such a deliberate racial purpose, strict scrutiny cannot be avoided simply by demonstrating that the shape and location of the districts can rationally be explained by reference to some districting principle other than race, for the intentional classification of voters by race, though perhaps disguised, is still likely to reflect the "impermissible racial stereotypes," *Shaw*, —— U.S. at ——, 113 S. Ct. at 2827, " 'illegitimate notions of racial inferiority' " and " 'simple racial politics,' " *id.* at ——, 113 S. Ct. at 2824, that strict scrutiny is designed to " 'smoke out.' " *Croson*, 488 U.S. at 493.

Hunt, 861 F. Supp. at 431-32.

This understanding of the level of racial intent needed to trigger strict scrutiny analysis in the redistricting context is the obvious implication of the *Reno* Court's adoption of the equal protection principles delineated in *Croson*, *Wygant*, and *Arlington Heights*, *see Reno*, 113

S. Ct. at 2824, 2825, 2829, 2830, 2831, 2832, and it is consistent with them. *Hunt*, 861 F. Supp. at 432 & n.19; *see also* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 643-49 (1993) (discussing *Reno* Court's importation of *Croson's* equal protection analysis, which "now serves as the paradigmatic case for equal protection analysis," to the redistricting context).

Before leaving this issue, we note that some courts that have addressed this question since the advent of *Reno*, have reached different conclusions regarding the level of racial consideration that is necessary to trigger strict scrutiny in the redistricting context. Some have concluded that race must be the sole motivation behind a particular district shape before strict scrutiny is appropriate.[11] *See Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 278 (2d Cir. 1994) (finding that lower court order did not transgress *Reno* because "it did not instruct the City Council to redistrict *solely* on racial grounds") (emphasis added), *cert. granted and judgment vacated and remanded*, 115 S. Ct. 35 (1994); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (stating that *Reno* held "when districts are drawn in such an extremely irregular fashion as to be unexplainable, other than being based *solely* on race, a claim under Equal Protection Clause for racial gerrymandering can be stated") (emphasis added), *petition for cert. filed*, 63 U.S.L.W. 3127 (U.S. Aug. 8, 1994) (No. 94-275). This interpretation presents the attractiveness of being a very literal rendering of *Reno's* emphasis that strict scrutiny should be applied to districts that are so irregular on their face that they "rationally cannot be understood *as anything other* than an effort to 'segregat[e] . . . voters on the basis of race.'" 113 S. Ct. at 2826 (emphasis added).

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[11] This also appears to be the position of the dissent. *See* Dissenting Op. at [13], [15].

Nevertheless, we agree with the *Hunt* court that this interpretation of *Reno* cannot be correct.

> If [*Reno*] meant no more than the state says it does, it would have precious little practical effect on race based districting, for it would require states to defend the deliberate creation of majority-minority districts under strict scrutiny *only* when they could not come up with any rational explanation for the location and shape of those districts other than race. This would seldom be the case, given the wide variety of other districting principles that may be used to justify even the most peculiar-looking districts.

Hunt, 861 F. Supp. at 429.

The Defendants propose that we adopt the triggering test of another court, which has determined that under *Reno* redistricting plans should be subjected to strict scrutiny analysis only when race is the "predominant" factor in the redistricting process. Defs.' Post Trial Br. at 55-56 (citing *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *stay granted*, 115 S. Ct. 36 (1994), *probable jurisdiction noted*, 115 S. Ct. 713 (1995)). The *Johnson* court describes it position as follows:

> [I]n order to invoke strict scrutiny, it must be shown that race was the substantial or motivating consideration in creation of the district in question. That term requires that the legislature (a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was the overriding, predominant force determining the lines of the district. If race, however deliberately used, was one factor among many of equal or greater significance to the drafters, the plan is not a racial gerrymander/racial classification subject to strict scrutiny.

Johnson, 864 F. Supp. at 1372. The *Johnson* court expressly crafted this position "to completely remove from

constitutional suspicion" those redistricting plans that were well drafted with the specific racial purpose of complying with the Voting Rights Act. *Id.* The *Johnson* court was concerned that following the *Hunt* court "race-a-motivating-factor" triggering test would virtually insure long and protracted litigation for the states every time a state rightfully considers the Voting Rights Act in its redistricting process. *Id.* at 1373. The *Johnson* court was "reluctant to conclude that the Supreme Court intended [in *Reno* for] voting rights litigation to sweep the country at ten-year intervals." *Id.*

Although, we agree with the *Johnson* court that the *Hunt* and *Hays I* courts' "race-a-motivating-factor" triggering test will theoretically subject all redistricting plans that exhibit racial intent to strict scrutiny analysis, including plans that are drawn with the racial purpose of complying with the Voting Rights Act, *see Hunt*, 861 F. Supp. at 433, we decline the ideological invitation to interpret the Constitution based on the prospects of increased litigation. Any developing legal context, like the arena of legislative redistricting, is bound to produce litigation regardless of the theories that are proposed and adopted.

Instead, we have adopted the "race-a-motivating-factor" triggering test because we find it is consistent with the Supreme Court's equal protection analysis in other contexts. We believe that both the "race-the-only-factor" and the "race-the-predominant-factor" triggering tests are expressly foreign to the Court's equal protection jurisprudence. As the Court noted in *Arlington Heights*:

> *Davis* does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated *solely* by a single concern, or even that a particular purpose was the *"dominant"* or *"primary"* one. . . . When there is a

> proof that a discriminatory purpose has been *a motivating factor* in the decision, . . . judicial deference is no longer justified.

429 U.S. at 265-66.

State redistricting plans that rightfully consider and apply the mandates of the Voting Rights Act, if challenged under the Equal Protection Clause, likely will incur strict scrutiny under the triggering test that we have adopted, but they will not be condemned automatically to constitutional invalidity. As Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (public higher education), demonstrated, although strict scrutiny may limit the ability of state actors to take race-based remedial action, it does not have to be "strict in theory, fatal in fact," *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring); *see also* Aleinikoff & Issacharoff, *supra*, at 643-45 (arguing that *Reno*, instead of *Crosonizing* reapportionment law, will ultimately be understood to have *Bakked* it). So long as a state is careful to narrowly tailor its redistricting plan to meet a compelling state interest, which can include compliance with the Voting Rights Act, the redistricting plan will survive strict scrutiny.

C. *Bizarre District Shapes: A Necessary Element?*

Relying on *Reno*, the Defendants contend that strict scrutiny is not required in this case because "Plaintiffs have not established that any of the districts in [the 1992 plan] are 'bizarre' or 'irregular.'" [12] Defs.' Post Trial

[12] Congruently, as an alternative holding, the dissent concludes that because the 1992 plan contained districts that were allegedly "regularly drawn, compact, contiguous, and geographically cohesive as required by Article XI of the Ohio Constitution" and because the Plaintiffs lacked evidence to the contrary, the Defendants were entitled to judgment on the Plaintiffs' equal protection claim. Dissenting Op. at [13, 14]. Thus, the dissent asserts that a plaintiff can only state a *Shaw v. Reno* claim if the redistricting plan

Br. at 55. This raises the question of whether the presence of bizarre district shapes is a necessary element to trigger strict scrutiny in a *Shaw v. Reno* claim.

Undeniably, the Court in *Reno* emphasized that the new cause of action under the Fourteenth Amendment was based on the presence of districts whose shapes were so irregular or bizarre that they rationally could not be understood as anything other than an effort to segregate voters on the basis of race. 113 S. Ct. at 2828, 2832. Such districts, however, do not draw close constitutional review simply because of their irregular shape. Adherence to traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, is not a constitutional requirement. *Id.* at 2827 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 & n.18 (1973)). Rather, bizarre-shaped districts demand strict scrutiny because their shape is circumstantial evidence that race has been a purposeful factor in their creation. *See Karcher v.*

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in question contains districts with bizarre shapes. Such a narrow interpretation of *Shaw v. Reno*, however, ignores the logical conclusion that if bizarre district shapes, as circumstantial evidence, are sufficient to state an equal protection claim under *Shaw v. Reno*, then certainly other direct or circumstantial evidence of race-based districting should also be sufficient to state an equal protection claim under *Shaw v. Reno*.

Moreover, the dissent's narrow reliance on traditional districting principles constitutes a logical fallacy. The presupposition of the dissent's conclusion is that if districts are drawn on the basis of traditional districting principles—compactness, contiguity, etc., then such districts cannot be the result of racial gerrymandering. Although the Court has noted that adherence to traditional districting principles is an "objective factor[] that *may* serve to defeat a claim that a district has been gerrymandered on racial lines," *Reno*, 113 S. Ct. at 2816 (emphasis added), it is certainly logically possible that districts could be crafted within the confines of traditional districting principles and be based on race at the same time. Thus, the dissent affords a preclusive constitutional significance to a state's compliance with traditional districting principles that not only exceeds the significance afforded by the Court, *see id.*, but also leads to a fallacious legal conclusion.

Daggett, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) ("One need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation." (footnotes omitted)). Logically, therefore, the Supreme Court's use of a district's shape as circumstantial evidence of racial intent implies that proof can be made "by any means, including state concession, bizarre shape, or some combination of the various factors typically used to prove the 'intent' element of an equal protection claim under *Arlington Heights*." *Hunt*, 861 F. Supp. at 431; *see Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."). Virtually all the courts that have addressed this matter are in agreement with this conclusion. *See Johnson*, 864 F. Supp. at 1374 ("The Supreme Court's use of a district's shape as circumstantial evidence of legislative intent implies that proof might be made by other means. . . . This is clearly the correct approach."); *Hays I*, 839 F. Supp. at 1195 ("If everyone—or nearly everyone—involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be found without resorting to the inferential approach approved by the Court in *Shaw*."). Thus, regardless of whether the evidence is direct or circumstantial or whether bizarre district shapes are present or not, if the evidence indicates that race was a substantial or motivating factor in the apportionment plan, then a *Shaw v. Reno* claim is stated and strict scrutiny analysis is required.

D. *Burden of Proof*

The parties agree that the Plaintiffs in this equal protection challenge bear the ultimate burden of persuasion

throughout the proceeding. *See Batson v. Kentucky*, 476 U.S. 79, 93-94 & n.18 (1986); *Wygant*, 476 U.S. at 277-78. If the Plaintiffs offer proof that the redistricting plan is race-based, then this gives rise to a presumption that the plan is unconstitutional, and the burden shifts to the Defendants to demonstrate that their use of race was narrowly tailored to meet a compelling state interest. *See Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436. Yet, the Defendants' shifted burden is one of production only, not persuasion. The Plaintiffs still bear the ultimate burden of persuading the court that the Defendants did not have a compelling state interest that justified their use of race in apportionment process or that the Defendants' redistricting plan was not narrowly tailored to meet such an interest. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring); *Hunt*, 861 F. Supp. at 436.

E. *Compelling State Interest*

Next, we consider those reasons that might serve as a compelling state interest, justifying a state's decision to engage in race-based redistricting. At this point, we are not concerned with whether the Defendants had a compelling justification for their consideration of race in the 1992 plan; we are concerned with whether the Defendants had a compelling justification for *any* redistricting plan that considered race as a substantial or motivating factor. The question of "whether the particular plan under challenge takes race into account to a greater degree than necessary to further a compelling state interest is a question for the 'narrowly tailored' prong of the strict scrutiny analysis, which examines the 'fit' between the compelling state interest and the precise means chosen by the state to accomplish it." *Hunt*, 861 F. Supp. at 437 (citing *Wygant*, 476 U.S. at 280 & n.6, and *Fullilove*, 448 U.S. at 507 (Powell, J., concurring)). Without presenting an exhaustive review of those reasons that theoretically might serve as a compelling state interest in the

redistricting context, we have chosen to limit our discussion to the compelling interest that the Defendants have offered in this case—compliance with section 2 of the Voting Rights Act. Defs.' Post Trial Br. at 57-63.

In *Shaw v. Reno*, the state argued that compliance with the Voting Rights Act was a compelling state interest. 113 S. Ct. at 2830. The Court, however, stopped short of totally endorsing this claim: "The states certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." *Id.* Obviously, the Court is aware that in strict scrutiny parlance a "compelling state interest" is a term of art. Thus, we do not think the Court's choice of the words "very strong interest" is insignificant. It suggests to us that the Voting Rights Act may serve as a compelling state interest in some circumstances, but in others, state action in conformity therewith may violate the Equal Protection Clause of the Fourteenth Amendment. *See Johnson*, 864 F. Supp. at 1381; *see also Johnson v. De Grandy*, 114 S. Ct. 2647, 2666-67 (1994) (Kennedy, J., concurring) ("Given our decision in *Shaw*, there is good reason for state and federal officials with responsibilities related to redistricting [that are engaging in remedial action pursuant to section 2 of the Voting Rights Act], as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause.").

Previously, the Court has recognized a state's compelling interest in taking race-based remedial measures to eradicate the effects of past racial discrimination. *Reno*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82). Furthermore, the Court has recognized that this interest extends to remedying past or present violations of federal statutes that were intended to eliminate discrimination in specific aspects of life. *See*

Croson, 488 U.S. at 500 ("constitutional or statutory violation"); *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring) ("violation of federal statutory or constitutional requirements"). Moreover, the Court has clarified that a state does not have to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277); *Hunt*, 861 F. Supp. at 437.

Applying these principles to the redistricting context and the Voting Rights Act, the *Hunt* court developed a very useful standard by which to determine when the Voting Rights Act can serve as a compelling state interest:

> Under these principles, we think it clear that a state has a "compelling" interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a "strong basis in evidence" for concluding that such action is "necessary" to prevent its electoral districting scheme from violating the Voting Rights Act.
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> . . . .
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> A state has a "strong basis in evidence" for concluding that it must engage in race-based redistricting in order to comply with the Voting Rights Act when it has information sufficient to support a *prima facie* showing that its failure to do so would violate the Act. *See Croson*, 488 U.S. at 500 (majority) (evidence "approaching a prima facie case of a constitutional or statutory violation").

Hunt, 861 F. Supp. at 437-439; *see Johnson*, 864 F. Supp. at 1381; *Hays I*, 839 F. Supp. at 1217 (Walter, J., concurring).

Generally, to establish a prima facie case that a single-member redistricting plan violates section 2 of the Voting

Rights Act, a plaintiff must show three things, the *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))); *Johnson*, 864 F. Supp. at 1287; *Hunt*, 861 F. Supp. at 440. Thus, when a state has reliable information that indicates the relevant minority group could establish a prima facie challenge under section 2 of the Voting Rights Act to the existing districting plan, then it has a "strong basis in evidence" for concluding that it must engage in race-based redistricting to comply with section 2 of the Voting Rights Act, and it has established a "compelling interest" for the remedial measures. *Hunt*, 861 F. Supp. at 440; *see Hays I*, 839 F. Supp. at 1217 (Walter, J., concurring).

F. *Narrowly Tailored*

Finally, we consider how to determine whether a racial gerrymander, if justified by a compelling state interest, is narrowly tailored to further that interest. The Court provided little help with this issue in *Reno*, other than to say that in the context of a challenge under section 5 of the Voting Rights Act, "[a] reapportionment plan would not be narrowly tailored if the State went beyond what was reasonably necessary to avoid retrogression." Therefore, we agree with the *Hunt* and *Hays I* courts that the best analytical approach is to examine the Court's deci-

sions that apply the narrowly tailored standard in other race-based remedial contexts. *See Hunt*, 861 F. Supp. at 444-45; *Hays I*, 839 F. Supp. at 1206-09, 1215 (majority and concurring opinions).

In other race-based contexts, the Court has examined five factors to determine whether a race-based affirmative action plan is narrowly tailored to serve the compelling state interest in remedying the discrimination: (1) the efficacy of alternative remedies that were less race-based or race-neutral; (2) whether the plan utilizes a fixed racial quota or a flexible racial goal; (3) the duration of the plan; (4) the relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates; and (5) the impact of the plan on the rights of third parties. *See United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (plurality); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 485-89 (1986) (Powell, J., concurring); *see also Croson*, 488 U.S. at 507-08; *Wygant*, 476 U.S. at 279-84. Although these criteria were developed in contexts other than race-based redistricting, we think they are easily adapted to this context. While we have engaged in a rigorous analysis, our inquiry has been careful and sensitive.

Considering the first factor, a court must decide whether the state could have accomplished its compelling interest by some means that was less race-based or race-neutral. *Wygant*, 476 U.S. at 280 n.6. If compliance with the Voting Rights Act is a state's compelling interest then, obviously, a race-neutral alternative does not exist. Assuming race must be considered to comply with the Voting Rights Act, the question then becomes whether a state could have complied with the Voting Rights Act with means that were less race-based. The Plaintiffs in this case do not allege that the Apportionment Board created more majority-minority districts than is reasonably nec-

essary to comply with the Voting Rights Act. Rather, they generally claim that the Board packed black voters into districts to comprise less than a majority, where a black minority population, in conjunction with significant white crossover votes, already had ample opportunity to elect the candidate of its choice without the addition of the black voters. This packing of black voters into districts where they were not needed allegedly resulted in a waste of black votes in the "packed" districts and a loss of minority "influence" in those districts where the black voters were previously located. Assuming *arguendo* that such race-based measures truly further compliance with section 2 of the Voting Rights Act, the analytical question becomes a two-fold concern: whether the 1992 plan creates more "packed" districts than is reasonably necessary to comply with the Act and whether the "packed" districts it creates contain substantially larger concentrations of minority voters than is reasonably necessary to give minority voters a realistic opportunity to elect representatives of their choice in those districts. *See Hunt*, 861 F. Supp. at 446; *Hays I*, 839 F. Supp. at 1206-08.

Regarding the second factor, a court must determine whether the challenged plan requires a fixed racial quota that is crafted to achieve a racial balance or requires a flexible goal to be used as a standard in gauging the state's efforts at eradicating the discrimination in question. *See Sheet Metal Workers*, 478 U.S. at 477-78. We agree with the *Hunt* court that racial gerrymanders will "seldom be invalid on this ground" because they do not impose a fixed racial quota. 861 F. Supp. at 446. Even if a state creates a certain number of districts that are designed to elect minority representatives, there is no guarantee that minority representatives will be elected. Thus, such districts can hardly be viewed as anything other than examples of an acceptable, flexible goal for minority representation. *See Sheet Metal Workers*, 478 U.S. at 487-88.

The third factor invokes consideration of the planned duration of the remedial measure. If it is not a temporary provision, it may last longer than reasonably necessary to eliminate the effects of the targeted discrimination. *See id.* at 479 (noting that a temporary race-based remedial measure is acceptable because it "will end as soon as . . . it is no longer needed to remedy past discrimination"). A race-based redistricting plan in Ohio will likely satisfy this test because the State is required, as a practical matter, to redistrict after each decennial census, and this will result in re-consideration and possible termination of the previous race-based plan.

The fourth factor requires the court to consider whether the remedial plan presents a reasonable relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates. As applied to the redistricting context, we think this requirement is satisfied so long as the percentage of racially-packed districts does not substantially exceed the percentage of minority voters throughout the state. *See Johnson v. De Grandy*, 114 S. Ct. at 2658 & n.11 (noting that ultimate right of section 2 of Voting Rights Act is minority voters' equal opportunity to elect candidate of their choice, as measured by proportionality between percentage of majority-minority voting districts in state to minority members' share of the relevant population throughout the state).

The fifth factor requires a court to consider whether the challenged plan "impose[s] an unacceptable burden on innocent third parties." *Paradise*, 480 U.S. at 182. As applied to the redistricting context, we agree with the *Hunt* and *Hays I* courts that "a race-based redistricting plan imposes an unacceptable burden upon third parties, [and] hence is not sufficiently 'narrowly tailored' to survive constitutional muster, if it fails to comply with re-

districting principles that are themselves constitutionally mandated, like the 'one person, one vote' standard and the prohibition against undue dilution of the voting strength of any identifiable group of voters." *Hunt*, 861 F. Supp. at 449; *see Hays I*, 839 F. Supp. at 1208. Like the *Hunt* court, however, we do not think that a racial gerrymander imposes an unacceptable burden on third parties simply because the redistricting plan has a bizarre shape or deviates from traditional districting principles, which, themselves, are not constitutionally mandated.[13] *Hunt*, 861 F. Supp. at 449-56.

At this point we note that it is important for all the issues presented in this case to be analyzed in a way that gives expression to the constitutionally and statutorily based national goal of protecting the rights of persons victimized by historic discrimination, so that they may effectively participate in changing public policies to "ensure nondiscrimination and fair opportunities in education, employment, housing, and other areas." Arthur A. Baer & Pamela S. Karlan, *Voting Rights Act Enforcement: An Agenda for Equal Electoral Opportunity, in New Challenges, The Civil Rights Record of the Clinton Administration Mid-term* 169 (Report of the Citizen's Commission on Civil Rights, 1995).

Court decisions of today must be mindful of the Supreme Court's admonition over one hundred years ago in *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886), that the right to vote is a "fundamental political right, because

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[13] Consider the words of Chief Justice Warren Burger in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), where the Court considered and approved the use of race-sensitive remedies to combat segregated schools. "The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations; and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system." *Id.* at 28.

preservative of all rights." The unanswered questions in *Shaw v. Reno* must not be responded to in such a way as to gut the Voting Rights Act's promise of equal electoral opportunity. When minority voters are packed into a district where they are unnecessary to the election of the minority's candidate of choice, who is capable of "changing public policies," such a plan must be justified by a compelling governmental purpose. This is particularly true when the effect of such a scheme is likely to be to reduce the opportunity for minority voters to coalesce with other voters to influence the election of candidates of their choice in the districts from which they are drawn. When this occurs the very spirit of the Voting Rights Act is eroded. The risk has prompted us to reject portions of the 1992 plan at issue here.

III. Findings of Fact and Conclusions of Law

Based on our review of the evidence submitted by both parties, we find, for the following reasons, that race was a substantial and motivating factor in the Defendants' 1992 apportionment plan:

1. The Plaintiffs claims of racial gerrymandering are somewhat unusual in this case. First, they allege that the Defendants drew race-based legislative districts in the urban areas of Ohio and that this decision had the ripple effect of causing irregular shaped districts throughout the State, which violated the traditional districting principles embodied in the Ohio Constitution, particulary Article XI, § 7. Pls.' Second Am. Compl. ¶ 55. In addition, the Plaintiffs alleged that some of the race-based districts, themselves, had irregular shapes in violation of the traditional districting principles contained in the Ohio Constitution. *Id.* Finally, the Plaintiffs alleged that the racially gerrymandered districts "included" House districts 31, 30, 22, 21, 38, 39, 44, and 49. *Id.* ¶ 56. The Defendants contend that the Plaintiffs

are limited to challenging only these eight districts, which were identified in their complaint. The Defendants, however, mischaracterize the Plaintiffs' complaint. The word "included" clearly is not an exclusive term. Thus, the eight districts identified in the complaint were illustrative of the alleged race-based districts but not necessarily an exclusive listing of them. That said, however, we note that we are not concerned with districts whose irregular shape may have been the ripple effect of another district that was racially gerrymandered. Such an irregular district may indeed violate proscriptions of the Ohio Constitution, but the focus of a *Shaw v. Reno* claim is racial gerrymandering in violation of the Fourteenth Amendment to the United States Constitution. Thus, we are only concerned in this case with districts that allegedly have been racially gerrymandered.

2. The Defendants admittedly considered race when drafting their 1992 apportionment plan. The Apportionment Board instructed Tilling to "draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act," and Tilling attempted to comply. Hr'g Tr. at 208. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act. *Id.* at 308.

3. Before Tilling drafted an apportionment plan, he attended public hearings throughout the state. At these hearings the Apportionment Board heard testimony from some members of the minority community requesting the Board to enhance minority voting strength by creating more majority-minority districts. Defendants' Post-Trial Br. at 2-3. At these hearings, Tilling publicly stated that consideration of and compliance with the Voting Rights Act was an

important principle guiding the apportionment process. *Id.* at 3-5.

4. The Apportionment Board's Findings and Conclusions, adopted on February 18, 1992,[14] in support of the 1992 plan, also reveal that race was a substantial and motivating factor in the apportionment process. Based on the conclusions that the Voting Rights Act protected classes of voters, not incumbents, *see, e.g.*, Bd. Findings ¶¶ 177, 183, and that racial bloc voting existed throughout the State of Ohio, including districts containing minority voters, *id.* ¶¶ 124, 167, the Apportionment Board decided that it needed to create districts that would contain sufficient black population to guarantee the election of any new (non-incumbent) black candidate. Thus, the Board through Tilling added black voters to minority districts outside of Cuyahoga County because "there [wa]s insufficient black population in the minority districts to guarantee the election of a black candidate particularly given levels of voter turnout and racial bloc voting in the district." *Id.* ¶ 168. Obviously, one of the working assumptions in this process was that black voters would choose a black candidate as their representative.

5. The Board's analysis of incumbency elections in minority districts for 1984, 1986, 1988, and 1990, revealed an incubency advantage of six to ten percent, *id.* ¶ 171, 173, and the Board concluded that it was unreasonable to configure districts based on the current incumbent because the successful incumbents might retire, die, or move on to other political positions during the 90's, *id.* at 172. *See also* Bd. Conclusion of Law ¶ 9 ("It is unreasonable to recon-

[14] The Apportionment Board has not met since February 18, 1992, either to change or modify its findings regarding the 1992 plan. Thus, these findings constitute direct evidence of the Apportionment Board's rationale and justification for the 1992 plan.

figure minority districts based on the electoral success of minority incumbents. Further, such reconfiguration will result in impermissible minority vote dilution. Consideration of factors such as racial bloc voting, voter turnout, population shifts, demographics, incumbency factors, voting patterns and other such factors require that minority districts outside Cuyahoga County must reflect increased relative percentages of black voting age population.") Accordingly, the Board determined that "unless Black Voting Age Population margins are adopted in minority districts, minorities risk losing minority districts." Bd. Findings ¶ 174.

6. In Franklin County, the Board drew district lines to enhance the possibility of electing a new black candidate. Board Finding 189 indicates that Tilling "reconfigured House districts 29 and 31 in Franklin County to protect minority voters in those districts and to create a minority Senate District in Franklin County where none previously existed." *Id.* ¶ 189. Tilling testified that the incumbent black legislators, Reps. Miller and Beatty, had indicated a desire to run for different offices, and because the Voting Rights Act protects classes of voters and not incumbents, black voters were added to the districts of Reps. Miller and Beatty to achieve this goal. *Id.* ¶ 189. The percentage of black population in Rep. Miller's district, H.D. 22 under the 1992 plan, was increased from 38.50% to 44.68%, a 6.18% increase, which is within the 6-10% standard that would be necessary to compensate for the possible loss of incumbency advantage. Defs.' Supp. Exs., Vol. I, Ex. DD. Likewise, the black population in Rep. Beatty's district, H.D. 21 under the 1992 plan, was increased from 46.80% to 54.30%, an increase of 7.50%. *Id.* Both Miller and Beatty previously had been elected to six and seven terms, respectively,

Bd. Findings ¶ 162, by pluralities of better than two-to-one.

7. In Lucas County, the Board drew lines to enhance the possibility of electing a new black candidate. Tilling stated that he drew the districts in Lucas County "to protect a class of voters, not the particular incumbent in that situation." *Id.* ¶ 177. Tilling added additional minority votes to Rep. Casey Jones' district, H.D. 49 under the 1992 plan, "not because Casey Jones needed them but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candidate of their choice." *Id.* Moreover, Tilling accepted the rationale of increasing minority voters in Casey Jones' district because the growth of the University of Toledo had displaced a number of individuals, causing some shift of population in his district, and because Jones might be nearing retirement age. *Id.* ¶ 195. The black population in Jones' district was increased from 41.70% to 49.99%, an increase of 8.29%. Defs.' Supp. Exs., Vol. I, Ex. DD.

8. In Summit County, the Board drew lines to enhance the possibility of electing new black candidates. Based on the conclusion that Rep. Vernon Sykes' district, H.D. 44 under the 1992 plan, was "losing black population and to avoid minority vote dilution." Bd. Findings ¶ 194, the Board increased the black population in Sykes' district from 35.40% to 43.07%, an increase of 7.67%. Defs.' Supp. Exs., Vol. I, Ex. DD. Previously Sykes had been elected to five terms by margins of two-to-one. Bd. Findings ¶ 162.

9. In Montgomery County, the Board drew lines to guarantee the election of new black candidates. Again, based on "population shifts" and the desire to "avoid dilution of minority voting," the Board in-

creased the black population in Rep. McLin's and Rep. Roberts' districts, H.D. 38 and H.D. 39, respectively under the 1992 plan. *Id.* ¶ 193. The black population in McLin's district was increased from 42.10% to 44.47%, an increase of 2.30% and the black population in Roberts' district was increased from 36.10% to 40.69%, an increase of 4.59%. Defs.' Supp. Exs., Vol. I, Ex. DD.

10. In Hamilton County, the Board drew lines to enhance the possibility of electing new black candidates. The Board found the following:

> Mr. Tilling, in drafting the 1991 Apportionment Plan, also determined that the Voting Rights Act protected classes of voters not incumbents. Since Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 [H.D. 31 in the 1992 plan] to increase the relative percentage of black population in that district in order to provide an opportunity for a new black candidate, without the benefit of incumbency, to be elected in the district.

Bd. Findings ¶ 183. Accordingly, the Board increased the black population in Mallory's district from 45.90% to 49.16%, an increase of 3.26%. Defs.' Supp. Exs., Vol. I, Ex. DD. The Board also increased the black population in Rep. Rankin's district, H.D. 30 in the 1992 plan, from 53.20% to 55.98%, an increase of 2.78% in a district that was already a majority-minority district. *Id.* The Board increased the black population in Rankin's district allegedly because "[a] new black candidate would require a district with increased black population to be successful." Bd. Findings ¶ 186.

11. In addition to the Apportionment Board's Findings and Conclusions, Tilling, who was the principal architect of the apportionment plan, kept handwritten

notes that indicated his procedure and his use of race in drawing the original apportionment plan. *See* Pls.' Ex. Prior Proceeding B, No. 120. The notes revealed that in his first five steps Tilling calculated the ideal population size of the Senate and House districts, pursuant to Article XI, Section 2 of the Ohio Constitution, and determined those counties that had populations within five percent of the ideal in accordance with Article XI, Section 10 of the Ohio Constitution. Beginning with step six and continuing with each urban county thereafter, the notes repeatedly indicate that Tilling displayed the minority population of each urban county on his computer screen and then drew the "minority districts" first before proceeding. This process and the attention to racial composition was confirmed at the hearing when Tilling testified concerning the maps of the urban districts drawn in accordance with the process contained in the notes. Hr'g Tr. at 344-51. Viewed sequentially, the maps indicated that for each urban county, the minority population was displayed; the most heavily black districts were drawn first; and each succeeding district that was drawn contained a decreasing percentage of black population. The Plaintiffs claim that the maps in conjunction with the notes establish that race was "the predominant concern of Mr. Tilling and the Board." Pls.' Post Trial Br. at 14. The Defendants contend that Tilling's notes and the corresponding maps are irrelevant because they refer to the original "model" plan that Tilling submitted to the Board on September 26, 1991. Although it is true that this exact plan was never in effect and was modified on numerous occasions, we still find it probative of the Defendants' consideration of race in the redistricting process. The fact remains that a not-too-distant forerunner of the 1992 plan was drawn in the aforementioned manner, and the Defendants do not contend

that the 1992 plan totally discarded the procedure and results of the original plan.[15]

12. Based on the foregoing facts, we conclude that race was a substantial and motivating factor in the Defendants' creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan. These House districts are the result of racial gerrymandering. Although none of these districts presents a bizarre shape, both direct evidence from trial testimony and the Apportionment Board's Findings and Conclusions, and circumstantial evidence from Tilling's notes and the accompanying maps, reveal that the Defendants intentionally crafted these eight districts, at least in part, with the purpose of separating voters on the basis of race.[16]

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[15] The dissent agrees that the notes of Tilling "strongly suggest that he purposefully considered race when he drew the house district boundaries in Amendment D" and that this evidence of race-based action should trigger strict scrutiny. Dissenting Op. at [17 n.9]; *see also* Dissenting Op. App. A. ¶¶ 21, 23, 30, 38, 45, 53, 60, 68, and 75. Nevertheless, the dissent totally ignores the better and more complete direct evidence of the Board's race-based redistricting that was contained in the Board's Findings and Conclusions, which were adopted specifically in support of the 1992 plan. *See supra* part III., ¶¶ 4-10.

[16] At one point the dissent implies that the Board's use of race in the redistricting process was nothing more than permissible "race-consciousness." Dissenting Op. at [16] ("In reality, the plaintiffs seek an expansion of *Shaw v. Reno* to include any reapportionment plan that is race-conscious and, in so doing, to expand the realm of judicial supervision to every reapportionment plan."); *Id.* at [21] ("[T]he plaintiffs . . . have failed to prove that the race-conscious concerns of the majority members of the Ohio Reapportionment Board constituted a substantial and motivating factor in the drawing of the boundary lines for the eight challenged districts."). The real expansion, however, appears to have occurred in the dissent's definition of "race-consciousness."

Earlier we noted under previous Court precedent that race-consciousness districting was simply taking action with the knowledge or awareness that it is likely to have a particular racial im-

13. Because race was a substantial and motivating factor in the 1992 plan, it must be subjected to strict scrutiny analysis. *Reno*, 113 S. Ct. at 2825, 2826, 2830. Thus, the burden of production shifts to the Defendants to show that the 1992 plan was narrowly tailored to meet a compelling state interest. *See Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436.

14. The Defendants claim that compliance with section 2 of the Voting Rights Act was the compelling state interest that justified their race-based redistricting. Defs.' Post Trial Br. at 57-63.

15. The Defendants agree that in order to show that section 2 of the Voting Rights Act was a compelling state interest, they must have a strong basis in evidence that race-based redistricting was necessary as a remedial measure to comply with the Voting Rights Act. *Id.* at 59-60. Moreover, the Defendants agree that a state has a "strong basis in evidence" to conclude that it needs to engage in race-based redistricting to comply with section 2 of the Voting Rights Act when the state has information that is reasonably sufficient to lead it to conclude that the relevant minority group could make out a prima facie section 2 challenge to the existing plan. *Id.* at 59, 60, 63.

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pact but race-based districting, which triggers strict scrutiny, is taking action with the specific intent or purpose to bring about such an impact. *See supra* part II.B. Clearly, the evidence presented in this case reveals that the Defendants intentionally crafted these eight districts with the purpose of separating voters on the basis of race. Thus, their action is correctly characterized as race-based instead of race-conscious.

Our colleague later recognizes this in his dissent when he admits that the "notes of James R. Tilling strongly suggest that he purposefully considered race when he drew the house district boundaries reflected in Amendment D and challenged here. Since citizens were at least in certain parts of the State, classified by race, the eight challenged districts arguably must be subjected to strict scrutiny." Dissenting Op. at [17 n.9].

16. As we noted earlier, a plaintiff can establish a prima facie case of a violation of section 2 of the Voting Rights Act by providing evidence that satisfies the three *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))).

17. Assuming without holding that the Defendants possessed information that would lead them to reasonably conclude that a plaintiff could satisfy the first two *Gingles* factors, we hold that the Defendants did not have a "strong basis in evidence" to engage in race-based redistricting in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan because they did not possess information that would reasonably lead them to conclude that a plaintiff could satisfy the third *Gingles* factor in these districts—the presence of racial bloc voting.

18. Both this court and the Supreme Court previously held on the basis of all the evidence, that racially polarized voting generally did not exist in Ohio's legislative elections. The Court noted the following:

> [A]ppellees [Plaintiffs in this case] have failed to demonstrate *Gingles*' third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found

> that Ohio does not suffer from "racially polarized voting." 794 F. Supp. at 700-01. Accord. App. to Juris. Statement 132a-134a, and n.2, 139a-140a. Even appellees agree. *See* Tr. of Oral Arg. 25. Here, as in *Gingles*, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles*, 478 U.S. at 49 n.15, 106 S. Ct. at 2766 n.15.

Quilter, 113 S. Ct. at 1158; *see also Quilter*, 1992 WL 677145, at *4 & n.2, n.3, *8 (holding that Ohio has coalitional voting, where whites cross over and vote for black candidates, and not polarized voting, where whites vote for white candidates and blacks vote for black candidates). By relying on these precedents, we are not saying that the Apportionment Board could not take race into account unless and until it had been proven in a court that a violation of section 2 of the Voting Rights Act had occurred. As we noted earlier, a state is not required to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277). Our point in noting the previous rulings of this court and the Supreme Court regarding the absence of polarized voting in Ohio was to emphasize that what was readily and reasonably apparent to and held by the courts, also should have been reasonably apparent to the Defendants—racially polarized voting generally does not exist in Ohio's legislative elections.[17]

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[17] We note, however, one exception. In *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), the district court held that the

19. The Defendants contend that Tilling reasonably concluded that "racial bloc voting existed throughout Ohio." Defs.' Post Trial Br. at 62 & n. 45. Yet, the bivariate regression analysis of the Plaintiffs' expert, Dr. Henderson, for the election years 1990, 1986, and 1984, revealed the presence of coalitional voting in each of the districts where the Defendants, through Tilling, chose to engage in race-based redistricting in the 1992 plan. *See Quilter,* 1992 WL 677145, at *4 & n.2. The percentage of white cross-over vote in each of those districts was as follows: Rep. Mallory—50.66%; Rep. Rankin—50.93%; Rep. Miller—44.50%; Rep. Beatty—50.25%; Rep. McLin—35.44%; Rep. Roberts—45.98%; Rep. Sykes —48.76%; Rep. Jones—44.46%. *Id.* at *4 n.2. Prior to the time that the Defendants adopted "Amendment D," the 1992 plan, their own expert, Dr. King, analyzed over 200 elections throughout Ohio, and he concluded that a "degree of racially polarized voting existed in Ohio," but he was not willing to characterize the degree of racial polarization as "legally significant." Defs.' Post Trial Br. at 63 & n. 47. Regardless of Dr. King's ability to comment on the "legal" significance of his analyses, the fact remains that Dr. King did not challenge Dr. Henderson's results on this point. *See Quilter,* 1992 WL 677145, at *4 n.3. Dr. King's own results regarding polarized voting in Ohio revealed that on average 95% of blacks voted for black candidates and 56.7% of whites voted for black candidates, thereby confirming Dr. Henderson's results. *Id.* at *4 n.2. In the Apportionment Board's Findings and Conclusions, the Board even admitted the presence

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two House districts, 52 and 53, under the 1981 redistricting plan, which were located in Mahoning County, violated section 2 of the Voting Rights Act. The court found under a totality of the circumstances analysis that racially polarized voting existed in these two districts.

of white cross-over voting in the minority districts where race-based remedial measures were utilized. Bd. Findings ¶ 168. Given the overwhelming statistical evidence of coalitional voting in the challenged districts under the existing plan, and given the fact that the Defendants had this information available to them before they adopted the 1992 plan, with its race-based remedial measures, we find that the Defendants could not reasonably conclude that the relevant minority group could establish a prima facie case of a violation of section 2 of the Voting Rights Act in the challenged districts. Significant evidence of white majority bloc voting in these Ohio legislative districts did not exist.

20. Because the Defendants did not possess a strong basis in evidence that they needed to engage in race-based redistricting to comply with section 2 of the Voting Rights, the Act does not provide a compelling state interest to justify the remedial action.[18] *See Hunt*, 861 F. Supp. at 440.

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[18] The dissent concludes that the "State of Ohio . . . has the compelling state interest of complying with the Voting Rights Act." Dissenting Op. at [18]. As support for this holding, the dissent relies on the district court's decision in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), where the court held that the two house districts, 52 and 53, located in Mahoning county under the 1981 redistricting plan violated section 2 of the Voting Rights Act, the Fifteenth Amendment to the United States Constitution, and section 7(C) of Article XI of the Ohio Constitution. The dissent implies that our instant finding that section 2 of Voting Rights Act did not constitute a compelling state interest to justify the Board's racial gerrymandering in the eight challenged House districts, is somehow inconsistent with the court's decision in *Armour*. In actuality, the two decisions present no conflict. The finding of racially polarized voting and a Voting Rights Act violation in one county of Ohio, does not necessarily mean that such evidence will be found in every county of Ohio. The House districts in Mahoning County under the 1992 plan were not even challenged in the instant case. To engage in race-based redistricting so as to remedy potential violations of section 2 of the Voting

21. Because the Apportionment Board lacks a compelling state interest for its racial gerrymandering in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan,[19] we conclude that these districts

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Rights Act, the Board must analyze the voting patterns in each district under the previous plan to determine if prima facie evidence of a section 2 violation exists. If such evidence does not exist in a given district, then the Board cannot engage in race-based redistricting in that district simply because a Voting Rights Act violation was found in another district in a different part of of the State.

[19] In dissent, our colleague concludes that the Apportionment Board did have another compelling interest that justified its racial gerrymandering: compliance with Article XI of the Ohio Constitution, which contains Ohio's mandate to utilize traditional districting principles in the redistricting process. Dissenting Op. at [18]. This conclusion is erroneous for a number of reasons.

First, no previous court has held that a state's interest in complying with its own constitution provides a *compelling* justification to engage in racial gerrymandering. The dissent cites case law, which holds that states do have a legitimate interest in complying with the traditional districting principles embodied in their state constitutions. Dissenting Op. at [18]. No court, however, has ever held in the context of an equal protection challenge and in the face of direct evidence of racial gerrymandering that a state's interest in complying with its traditional districting principles provided compelling justification to engage in racial gerrymandering. Even the Defendants, themselves, do not make such a claim. To be sure, the Defendants argued that the Apportionment Board's compliance with Article XI of the Ohio Constitution indicated that it did not engage in racial gerrymandering and that strict scrutiny accordingly was not required. *See* Defs.' Trial Br. at 6-14, 61-64; Defs.' Post Trial Br. at 45-56. Nevertheless, even the Defendants realized that if this court determined that strict scrutiny was triggered by evidence of racial gerrymandering, the Defendants' only viable compelling interest sufficient to justify such race-based redistricting would be the Board's interest in complying with the mandates of section 2 of the Voting Rights Act. Thus, the Defendants relied solely on the Voting Rights Act as compelling justification for their race-base redistricting, once such a condition was determined, and did not even proffer compliance with the Ohio

violate the Equal Protection Clause of the Fourteenth Amendment. Based on our holding, we find it unnecessary to discuss whether the 1992 plan was

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Constitution as a compelling justification. *See* Defs.' Post Trial Br. at 56-63.

Second, the dissent's conclusion defies logical reasoning. Without reiterating the Fourteenth Amendment's aversion toward race-base classifications, suffice it to say that our earlier analysis of Supreme Court precedent revealed that a state's purposeful use of race can only survive strict scrutiny if it is remedial in nature and substantially supported by evidence of past racial discrimination. *See Reno*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82). For example, in the context of our discussion of the Voting Rights Act as a compelling state interest, we noted that compliance with Voting Rights Act could serve as a compelling justification to engage in race-based redistricting so long as substantial evidence was present to indicate the need for such remedial action. *See supra* part II.E. Compliance with the Voting Rights Acts, which was promulgated as a remedial measure for racial discrimination in the voting context, will clearly require that the apportioning entity purposefully consider race. Obviously, compliance with the traditional districting principles in the Ohio Constitution does not qualify as such a compelling interest. The Apportionment Board did not have to purposefully consider race so as to remedy past racial discrimination in order to comply with the traditional districting principles in the Ohio Constitution. The traditional districting principles in Article XI were clearly designed with the purpose of eliminating all forms of bias from the redistricting process. *See* Ohio Const. art. XI. Thus, to conclude that the Board's interest in complying with these principles justified their racial gerrymandering is absurd.

Finally, even if we did conclude that compliance with the traditional districting principles in Article XI could constitute a compelling state interest justifying racial gerrymandering, the Defendants would still lose because the evidence reveals that the Apportionment Board did not comply with section 7(D) of Article XI. Section 7(D) reads as follows:

> In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article.

Ohio Const. art. XI, § 7(D). Forty-four pre-existing 1981 House districts were available for retention pursuant to section 7(D)

because they fell within the population parameters established by section 3. *See* Pls.' Post-Hr'g Br. at 37. The Plaintiffs demonstrated through an alternative redistricting plan, the "7D plan," that thirty of the forty-four districts could, indeed, have been maintained. *Id.* The Defendants, however, destroyed all but seven of these pre-existing House districts. *Id.*; Dissenting Op. App. A, ¶ 13.

The Defendants retained only seven of the pre-existing house districts predominantly because they interpreted and applied the provisions under section 10 of Article XI, which delineates the creation and numbering of House districts, as taking precedence over section 7(D). In fact, the dissent agreed with the Defendants' interpretation of Article XI of the Ohio Constitution. Dissenting Op. at [13]. Nevertheless, section 10 explicitly states that the creation of districts pursuant to section 10 is to be governed by earlier sections of Article XI, including section 7:

> The standards prescribed in sections 3, 7, 8, and nine of the Article shall govern the establishment of house of representatives districts, *which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards.*

Ohio Const. art. XI, § 10. Thus, every time the Apportionment Board created a new house district pursuant to section 10 and disregarded a pre-existing house district that could have been retained pursuant to section 7(D), it violated the express language of the Ohio Constitution. To read the dissent's description of the redistricting process under Article XI, however, one would never realize that section 7(D) even existed. *See* Dissenting Op. App. A, ¶¶ 7-15.

Moreover, in describing the creation and numbering of House districts under section 10 of Article XI, the dissent claims that, pursuant to section 10(C), after districts are formed within a county having more than one whole ratio of representation, any remaining territory "must be combined with adjoining territory outside the county before proceeding to combine the remaining territory of the state into representative districts." Dissenting Op. App. A, ¶ 14. Clearly, however, section 10(C) does not mandate such a process. The Defendants interpreted section 10(C) in the same manner, and this "loose" interpretation greatly contributed to the resultant destruction of existing districts in other counties that could have and should have been retained pursuant to section 7(D) of Article XI.

As an aside, we note that our consideration of the last issue is not legally precluded by the Ohio Supreme Court's decision in

narrowly tailored to further a compelling state interest.[20]

IV. Conclusion

The Fourteenth and Fifteenth Amendments to the United States Constitution, and the Voting Rights Act of 1965 have been major vehicles for the empowerment of black Americans long denied the full enjoyment of their political rights. Over the years, various schemes and artifices have been designed to serve as impediments to the attainment of citizenship status by minorities. As Justice Frankfurter, however, wrote for the Supreme Court in *Lane v. Wilson*, 307 U.S. 268, 275 (1939), "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Without characterizing the nature of the discrimination present here, we simply hold that Justice Frankfurter's admoni-

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Voinovich v. Ferguson, 586 N.E.2d 1020 (1992) (per curiam). Contrary to the dissent's conclusion, *see* Dissenting Op. App. A, ¶ 17, the Ohio Supreme Court did not hold that the entire redistricting plan complied with the requirements of Article XI of the Ohio Constitution. A careful reading of the court's brief per curiam opinion reveals that the court was only addressing the constitutionality of Senate District 32 in the redistricting plan. *See Ferguson*, 586 N.E.2d at 1021. The majority of the court did not address the constitutionality of a single House district in the proposed redistricting plan under the Ohio Constitution.

[20] We note, however, for instructional purposes that any redistricting plan that, for race-based remedial purposes, proposes to move black voters into a district that already has more than 35% black population, may have a difficult time passing the narrowly-tailored prong of strict scrutiny analysis. Statistical evidence in Ohio revealed that there was only one legislative district in the last twenty-five years that had more than 35% black population and did not elect a black candidate. *Quilter*, 1992 WL 677145, at *8 & n.5. Thus, currently in Ohio, 35% black population in a district is considered adequate to provide the black population with an equal opportunity to elect the candidate of its choice, since it has been shown that Ohio does not have a history of racially polarized voting in the state legislative districts at issue here. *Id.*

tion is equally applicable to the Equal Protection Clause of the Fourteenth Amendment. Using race to draw lines to concentrate black voters in discrete legislative districts with the reciprocal effect of siphoning off and reducing their influence in other districts, without legally cognizable justification, is incompatible with the Constitution, as now interpreted by the Supreme Court. Accordingly, we direct the State Defendants to redraft House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan to comply with the aforementioned principles.

In placing reliance on this court's and the Supreme Court's holdings that racial bloc voting had not occurred in Ohio's legislative elections, we make no judgment as to the state of racial progress in other aspects of race relations in Ohio. The fact that black voters, however, in the various legislative districts, as shown by the record in this case, coalesce with white voters in significant enough numbers to elect candidates of their choice, who happened to be black, demonstrates a high degree of maturity. In our view, this degree of voter maturity represents the essence and ultimate objective of the Voting Rights Act and the Constitution. We must not, we dare not permit a retreat from this admirable advance in electoral politics by approving a plan such as this.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze, Sr.
ANTHONY J. CELEBREZZE, SR.
U.S. Circuit Judge

APPENDIX D

[Filed Mar. 31, 1994]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

BARNEY QUILTER, *et. al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et. al.*,
Defendants.

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE
JUDGE DAVID D. DOWD, JR.

OPINION AND ORDER

BEFORE: JONES, Circuit Judge; CELEBREZZE, Senior Circuit Judge; and DOWD, District Judge.

NATHANIEL R. JONES, Circuit Judge. The plaintiffs filed this action to challenge the apportionment of Ohio's state legislative districts performed pursuant to 1990 census data. In *Voinovich v. Quilter*, 113 S. Ct. 1149, 1159 (1993), the United States Supreme Court determined that the plaintiffs had established a *prima facie* case that the population disparity among districts violates the Equal Protection Clause of the Fourteenth Amendment. The

Court remanded the case to this court, instructing it to determine whether the disparity is justified. After consideration of this issue, we find that the population variations are justified under established constitutional standards.

I

Pursuant to the Constitution of the State of Ohio, state house districts and state senate districts are drawn by a board of five individuals every ten years.[1] Such a five-member board was established following the 1990 federal census. The majority of the apportionment board[2] appointed Defendant James R. Tilling to draft an apportionment plan on their behalf. After Tilling submitted his plan, the board made various amendments to it, and the plaintiffs in this case challenged the plan that eventually was adopted. On February 18, 1992, in response to the Plaintiffs' constitutional attacks upon the plan, the

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[1] Article XI, § 1 of the Constitution of the State of Ohio provides:

> The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.
>
> Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year [1971] and every tenth year thereafter. . . .

[2] The majority consisted of George V. Voinovich, Governor of the State of Ohio; Stanley J. Aronoff, President of the Ohio Senate; and Robert A. Taft, II, Secretary of State of Ohio. In the minority were Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, and Thomas E. Ferguson, Auditor of the State of Ohio.

board made its last changes, resulting in what has been denominated "Amendment D." The plaintiffs maintained their challenge to Amendment D, claiming, *inter alia*, that the populations of some of the districts depart too greatly from the ideal size.

A. The House Districts at Issue

After the 1990 census, the ideal Ohio house district included 109,567 individuals.[3] Amendment D designates as house districts seven counties whose population fall within ± 10% of the ideal house district size. The populations of four of these counties fall between 95% and 105% of the ideal.[4] The populations of the three others fell between 90%-95% or 105%-110% of the ideal: House District 5 (Ashtabula County—population 99,821, or 91.10% of the ideal district size); House District 6 (Fairfield County—population 103,461, or 94.43% of the ideal district size); and House District 7 (Wayne County—population 101,461, or 92.60% of the ideal district size).

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[3] *See* Ohio Const. art XI, § 2:

> The apportionment of this state for members of the general assembly shall be made in the following manner: The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and the quotient shall be the ratio representation in the house of representatives for ten years next succeeding such apportionment. . . .

According to the 1990 census, Ohio's population was determined to be 10,847,115.

[4] The four counties whose populations fell between 95% and 105% of the ideal district size are: House District 1 (Allen County—population 109,755, or 100.17% of the ideal district size); House District 2 (Warren County—population 113,909, or 103.96% of the ideal district size); House District 3 (Columbiana County—population 108,276, or 98.82% of the ideal district size); and House District 4 (Wood County—population 113,269, or 103.38% of the ideal district size).

Under Amendment D, the largest district (House District 20—a portion of Cuyahoga County) has a population of 114,943, or 104.91% of the ideal district size. As the majority plan stands then, the total deviation[5] between the most populous and least populous state house districts is *13.81%* (or the 104.91% of House District 20 minus the 91.10% of House District 5).

B. The Senate Districts at Issue

After the 1990 census, the ideal Ohio senate district included 328,700 individuals.[6] Pursuant to Article XI, Section 11 of the Constitution of the State of Ohio, "[s]enate districts shall be composed of three contiguous house of representatives districts." Under Amendment D, the smallest senate district is Senate District 32—composed of House District 66 (the southwestern quadrant

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[5] As we described *Quilter v. Voinovich*, No. 5:91 CV 2219 (N.D. Ohio Mar. 19, 1992) at n.11:

> Total deviation is arrived at by adding the percentage above the ideal district population of the most overpopulated district to the percentage below the ideal district population of the most underpopulated district. Thus, a districting criterion that allows a *deviation* of plus or minus 5% would, generally speaking, yield a *total deviation* of 10%. *See, e.g., Connor v. Finch*, 431 U.S. 407, 416-17 (1977) (finding that 8.2% above the norm and 8.3% below the norm yields a total deviation, or "maximum deviation," of 16.5%).

(Emphasis in original.)

An alternative means of making the same calculation, used in the text, is to express the districts' relationship to the ideal district in percentage terms and then subtract the lowest percentage value from the highest one.

[6] *See* Ohio Const. art XI, § 2:

> . . . The whole population of the state as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment.

of Trumbull County), House District 67 (the southeastern quadrant of Trumbull County), and House District 68 (Geauga County and the northern half of Trumbull County). Senate District 32 has a population of 308,942, or 93.99% of the ideal district size. The largest is Senate District 1—composed of House District 82 (Williams, Fulton and Defiance Counties), House District 83 (Henry, Paulding, Putnam, and Van Wert Counties), and House District 86 (Hancock and Hardin Counties, and the northeastern quadrant of Auglaize County). Senate District 1 has a population of 343,582 individuals, or 104.53% of the ideal district size. Thus, the total deviation for the senate districts is *10.54%* (or 104.53% minus 93.99%).

C. The Court's Remand

In an unpublished order filed March 19, 1992, we held that the plan's population disparities violated the equal population principles of the United States Constitution. In its opinion, the Supreme Court, *inter alia*, reversed this judgment and held that the plaintiffs had merely stated a *prima facie* case of vote dilution and that the apportionment plan's creators must be given an opportunity to explain whether the deviations are justified. 113 S. Ct. at 1159. Specifically, the Court instructed that we consider whether the deviations from the ideal district size are justified using the analysis employed in *Brown v. Thomson*, 462 U.S. 835, 843-46 (1983), and *Mahan v. Howell*, 410 U.S. 315, 325-330 (1973). 113 S. Ct. at 1159. In the following sections, we fully consider the defendants' justification under *Brown*, *Mahan*, and the Court's other relevant precedents.

II

The Supreme Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), established the principle that the Equal Protection Clause prevents the dilution of votes that can

occur when citizens are placed in overpopulated state legislative districts.

> We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Id. at 568.[7]

We are to give states "[s]omewhat more flexibility" in their establishment of state legislative districts as opposed to federal congressional districts. *Reynolds*, 377 U.S. at 578; *see also Brown*, 462 U.S. at 850 n.2 (O'Connor, J., concurring) ("The Court has recognized that States enjoy a somewhat greater degree of latitude as to population disparities in a state legislative scheme, which is tested under Equal Protection Clause standards, than in a congressional redistricting scheme, for which the Court has held that Art. I, § 2, of the Constitution provides the governing standard."); *Mahan*, 410 U.S. at 321-22, 327. The Court has given instructions as to the nature and extent of this flexibility in *Mahan*, *Brown*, and its other cases in this area.

Whether a *prima facie* case of a Fourteenth Amendment violation is established depends principally upon the amount of total deviation. Deviations from mathematical equality among state legislative districts are to be considered *de minimis* if the total deviation is be-

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[7] At the time *Reynolds* was decided, the Court had already held that Article I, Section 2 of the Constitution requires that congressional districts be subject to an equal population standard. *See Wesberry v. Sanders*, 376 U.S. 1, 6 (1964). *Reynolds* and *Wesberry* both implemented the Court's seminal decision in *Baker v. Carr*, 369 U.S. 186 (1962), which held that districting disputes are justiciable.

tween 0% and 10%. Where the deviation is *de minimis*, a plaintiff cannot establish a *prima facie* case of discrimination under the Equal Protection Clause. *Brown*, 462 U.S. at 842-43; *Connor v. Finch*, 431 U.S. 407, 418 (1977); *see generally White v. Regester*, 412 U.S. 755, 763-64 (1973) (state needed to provide no explanation for 9.9% total deviation); *Gaffney v. Cummings*, 412 U.S. 735, 750 (1973) (state needed to provide no explanation for 7.83% total deviation); *Abate v. Mundt*, 403 U.S. 182, 184-87 (1971) (county explanation required to uphold 11.9% total deviation).

If, as in the instant case, the total deviations exceed 10%, a *prima facie* case of a violation is established and the state is called upon to justify the deviations. Its justification must consist of three components: (1) articulating a "rational state policy" which may justify the deviations; (2) explaining how the apportionment plan "may reasonably be said to advance" the rational state policy; and (3) showing that the deviations resulting from the reasonable pursuit of the rational state policy do not "exceed constitutional limits." *Mahan*, 410 U.S. at 328; *see also Brown*, 462 U.S. at 843.

III

We now consider the components of the justification advanced to explain the population disparity here.

A. Whether Defendants have asserted a rational state policy.

The Supreme Court has considered certain purported rational policies to be unacceptable:

> [N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from

> the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow . . . most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

Reynolds, 377 U.S. at 579-80. On the other hand, thus far the Court's foremost example of a rational state policy is the preservation of political subdivisions within a state. *See, e.g., Brown*, 462 U.S. at 842-43; *Mahan*, 410 U.S. at 329 ("The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature, the policy consistently advanced by Virginia as a justification for disparities in population among districts that elect members to the House of Delegates, is a rational one."); *Reynolds*, 377 U.S. at 580 ("A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions.").

The defendants seek to justfy the total deviations in excess of 10% by asserting the rational state policy of preserving county lines, even with respect to those whole-county house districts whose populations depart by more than 5% from the ideal house district size. As described above, the Court expressly has found such a policy to justify deviations from population equality among state legislative districts.

Furthermore, it also appears that the asserted rational state policy has not been advanced disingenuously. The

people of the State of Ohio have enacted constitutional provisions reflecting the proffered policy:

> XI § 3 House of representatives districts
>
> The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article.
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> . . . .
>
> XI § 9 Whole county as district
>
> In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the house of representatives, reasonable effort shall be made to create a house of representatives district consisting of the whole county.

Ohio Const. art. XI, §§ 3, 9; *see also* Ohio Const. art. XI, § 10(B) ("Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district."). The state constitution also manifests a policy of respecting county lines in the formation of senate districts:

> XI § 11 Formation of senate district
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> . . . A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio

> shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

Ohio Const. art. XI, § 11.

Ohio's clearly stated policy distinguishes this case from *Chapman v. Meier*, in which the Court rejected North Dakota's political boundary explanation for its plan's deviations. 420 U.S. 1, 25 (1975) ("It is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines.").

We find that the justification the Defendants advance for the total deviations in excess of 10% is appropriate for Equal Protection purposes, and has not been advanced without basis, for there is a state constitutional policy favoring the preservation of county lines when establishing state legislative districts.

B. Whether the plan reasonably advances the policy.

The next question is whether Amendment D may reasonably be said to advance this rational state policy. The house districts were formed by following the procedures outlined in the state constitution:

> XI § 10 Creation and numbering of house of representatives districts
>
> The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:
>
> > (A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in

> section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio *shall* be designated a representative district.
>
> (B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio *may* be designated a representative district.

Ohio Const. art. XI, § 10 (emphasis added).

Subsection 10(A) thus mandates the creation of whole county house districts where the counties fall within ±5% of the ideal size; such counties could not in themselves create a total deviation above 10%. Subsection 10(B) permits the apportionment board to create districts out of counties within an additional 5% of the ideal size. We believe that providing this amount of additional latitude for house districts, but no more, is a reasonable manner in which the state may advance its policy.

The Ohio Constitution contains no equivalent provision that permits the creation of senate districts that deviate by more than 5% from the ideal. However, in the state court companion to this lawsuit, the Ohio Supreme Court directly upheld the creation of Senate District 32, the only district outside the permissible range. *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992). This decision interprets the constitution to permit the apportionment board to place the constitutional prohibition against dividing counties above the requirement that district populations fall within 5% of the ideal. The Ohio court explained that:

> leaving Senate District 32 underpopulated was unavoidable because irreconcilable conflicts with [the constitutional sections prohibiting the division of counties between senate districts] prevented adding

> population from adjacent territory. . . . When such provisions are irreconcilable, those public officials designated to apportion the state by Section 1 of Article XI have the duty to choose the proper course, and this court will not order them to correct one constitutional violation by committing another.

Id. at 1022. Since Ohio's highest court has found the district's population deviation authorized by the state constiution, we accept that determination. *Brown v. Ohio*, 432 U.S. 161, 167 (1977). At least where a district so created deviates by no more than 10% from the ideal, this interpretation of the Ohio Constitution reveals a manner of advancing the state policy that is just as reasonable as the expanded population range that Article XI, Section 10 explicitly provides for whole-county house districts.

Despite our conclusion that Ohio's constitution reasonably advances the policy, we must further delve into the implementation of the discretion that the constitution gives the apportionment board. Plaintiffs argue that this *particular* plan inconsistently or arbitrarily advances the policy, and we must not casually dismiss this assertion. *See Roman v. Sincock*, 377 U.S. 695, 710 (1964) (rational factors applied in a manner "free from any taint of arbitrariness or discrimination"); *Brown*, 462 U.S. at 847; *Mahan*, 410 U.S. at 325. One way that plaintiffs may show arbitrariness is to prove that a plan could be produced that advances the policy just as well, but which creates a smaller total deviation. This is why the Court rejected Mississippi's county-line justification in *Connor v. Finch*, 431 U.S. at 420 ("[T]he plaintiffs in this case submitted to the District Court an alternative Senate plan that served the state policy against fragmenting county boundaries better than did the plan the court ultimately adopted and also came closer to achieving districts that are as nearly of equal population as is practicable.") (quotation omitted). In cases that reject districting plans,

the Court has typically made reference to an alternative plan to show that the contested plan did not achieve the state's stated policy. *See Swann v. Adams*, 385 U.S. 440, 445 (1967) ("Florida could have come much closer to providing districts of equal population that it did" and still advanced its policy); *Kilgarlin v. Hill*, 386 U.S. 120, 124 (1967) (per curiam) ("[t]he District Court [did not] articulate any satisfactory grounds for rejecting at least two other plans presented to the court, which respected county lines but which produced substantially smaller deviations from the principles of *Reynolds v. Sims*."); *cf. Mahan*, 410 U.S. at 326 (plan approved in part because "[t]here was uncontradicted evidence offered in the District Court to the effect that the legislature's plan, subject to minor qualifications, produces the minimum deviation above and below the norm, keeping intact political boundaries. . . .").

Consistent with this case law, Plaintiffs focus their objections to the instant plan on the argument that it arbitrarily advances the defendants' stated policies. Having reviewed their specific objections, however, we find that they are inapposite. Plaintiffs' assertions of arbitrariness at best support the conclusion that Amendment D could have better effectuated certain districting goals, such as keeping townships in the same district, but these objections alone do not cast doubt on the state's advancement of its policy with respect to the whole-county districts that created the total deviation of greater than 10% here. Because the state policy at issue here is concerned narrowly with keeping together whole counties, and because the board has in fact preserved all whole counties within the applicable population limits, it cannot be said that the policy has been advanced arbitrarily.

The three state house districts that depart more than five percent from the ideal are whole counties. The state senate district that deviates more than five percent is, likewise, composed of two counties—no more, no less.

Except for these whole-county districts, the plan's total deviation falls below the 10% threshold that is necessary for the plaintiffs to prove a *prima facie* case of population disparity. Thus, we find the deviations at issue here are the result of line-drawing that reasonably advances the rational state constitutional policy.

C. Whether the total deviation exceeds constitutional limits.

The final consideration to be addressed is whether the total deviations of 13.81% and 10.54% are constitutionally excessive. As the United States Supreme Court in *Brown* stated:

> Even a neutral and consistently applied criterion such as use of counties as representative districts can frustrate *Reynolds'* mandate of fair and effective representation if the population disparities are excessively high. "A State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality." *Mahan*[, 410 U.S. at 326].

Brown, 462 U.S. at 845; *cf. Reynolds*, 377 U.S. at 581 ("Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-protection principle in that legislative body."). In light of *Mahan*, the total deviations at issue in the instant case are not constitutionally excessive.

In *Mahan*, the Virginia legislature adopted an apportionment plan for state legislative districts that resulted in a total deviation of 16.4% with respect to the state house districts. As in the instant case, the justification offered for the deviation was the preservation of political subdivisions. The Supreme Court concluded:

> Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not. The 16-odd percent maximum deviation that the District Court found to exist in the legislative plan for the reapportionment of the House is substantially less than the percentage deviations that have been found invalid in the previous decisions of this Court. *While this percentage may well approach tolerable limits, we do not believe it exceeds them.* Virginia has not sacrificed substantial equality to justifiable deviations.

Mahan, 410 U.S. at 329 (emphasis added).

Other state-districting cases in which the Court has found a violation concerned higher total deviations than *Mahan*. *See Reynolds*, 377 U.S. at 549 (500+% deviation) (approximate calculation from figures given); *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 701-02 (1989) (78% deviation) (city districts); *Kilgarin*, 386 U.S. at 122 (26.48% deviation) (dicta); *Swann*, 385 U.S. at 442-43 (25.65% deviation); *Chapman*, 420 U.S. at 22 (20.14% deviation) (court-ordered plan); *Connor*, 431 U.S. 407 at 416-17 (19.3% house and 16.5% senate deviations). Likewise, deviations below the *Mahan* threshold have been found permissible. *See Abate*, 403 U.S. at 184 (11.9% deviation) (city boundaries); *Jenkins v. City of Pensacola*, 638 F.2d 1249, 1255 (5th Cir.) (14% deviation) (city districts), *cert. dismissed*, 453 U.S. 946 (1981).

We can find no case holding that a total deviation—with respect to a legislative plan of apportionment of *state* legislative districts—of less than 16.4% is constitutionally excessive.[8] Thus, we hold that the total devia-

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[8] We note that in *Brown*, the Court upheld a total deviation that was much higher than even that in *Mahan*, approving Wyoming's

tions of 13.81% and 10.54% are not excessive for purposes of the Equal Protection Clause of the Fourteenth Amendment. Under Ohio's constitutional scheme, it is possible that the preservation of whole-county districts could one day beget total deviations higher than those in Amendment D—and in fact as high as 20%, if a county exists that is 10% below the ideal population and another county exists that is 10% above. We express no view today on whether such higher total deviations would be excessive, for we need only decide that those in this plan are not.

IV

In sum, we hold today that the Ohio reapportionment plan survives scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the defendants have advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts; (2) their plan reasonably furthers the rational state policy; and (3) the 13.81% and 10.54% total deviations fall within constitutional limits. Accordingly, we enter judgment for the defendants on this issue.

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placement of a state representative in a sparsely populated county that created a total deviation of 89%. The Court carefully narrowed its holding to the particular fact situation, showing that the single representative did not greatly dilute the voting power of others in the state, since the *average* deviation between districts was 16%. 462 U.S. at 846-47. We also note that the Court has placed stricter limits on congressional reapportionment. In *Karcher v. Daggett*, 462 U.S. 725, 731-32 (1983), the Court struck down New Jersey's *congressional* reapportionment plan even though the deviation was a minuscule 0.6984%. In that case, the Court found the state's asserted justification was so empty that it did not even justify the small deviation at issue.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze
ANTHONY J. CELEBREZZE
Senior U.S. Circuit Judge

/s/ David D. Dowd
DAVID D. DOWD
U.S. District Judge

APPENDIX E

[Filed Mar. 31, 1994]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, et al.,
Defendants.

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE
JUDGE DAVID D. DOWD, JR.

OPINION AND ORDER

BEFORE: JONES, Circuit Judge; CELEBREZZE, Senior Circuit Judge; and DOWD, District Judge.

NATHANIEL R. JONES, Circuit Judge. Before this court is the Motion of Plaintiffs for Leave to File a Second Amended Complaint. For the following reasons, the motion is granted.

I

This case is on remand from the United States Supreme Court, which, in *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), resolved three issues concerning the defendants' plan that reapportioned Ohio's state legislative districts

pursuant to 1990 census data. First, the Court held that the plan does not violate the protection against race-based vote dilution in § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. *Id.* at 1154-58. Second, the Court held that the plan does not violate the Fifteenth Amendment to the Constitution. *Id.* at 1158. Third, the Court found that the plaintiffs had stated a *prima facie* case of population-based vote dilution in violation of the Equal Protection Clause of the Fourteenth Amendment, and instructed this court to further consider that issue. *Id.* at 1159. The court then remanded the case "for further proceedings in conformity with this opinion." *Id.* at 1159-60. We resolve the third issue in a separate opinion filed today.

Several months after its *Voinovich* decision, the Court decided the important districting case *Shaw v. Reno,* 113 S. Ct. 2816 (1993). *Shaw* held for the first time that a plaintiff can state a claim under the Equal Protection Clause by alleging that a districting plan reflects "an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Id.* at 2832. As the Court stated:

> Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

113 S. Ct. at 2832. In their initial submissions to this court on remand, the parties discussed *Shaw*'s applicability to this case, and in a December 22, 1993 Order we requested that the parties comment further on the applicability of *Shaw*. At this juncture, the plaintiffs submitted the instant motion to amend their complaint to plead the *Shaw* issue, and they have filed a complaint that is amended accordingly. The defendants oppose this motion.

II

The plaintiffs' first amended complaint alleged that the apportionment plan violated the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution. 113 S. Ct. at 1153. As the Court described the allegations:

> According to the appellees, the plan "packed" black voters by creating districts in which they would constitute a disproportionately large majority. This, appellees contended, minimized the total number of districts in which black voters could select their candidate of choice. In appellees' view, the plan should have created a larger number of "influence" districts —districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice.

Id. In the earlier proceedings before this panel, both parties produced volumes of information dealing with the boundaries, populations, and racial composition of Ohio's legislative districts. The parties explicitly raised the issue of racial gerrymandering, albeit in the context of alleging violations of the Fifteenth Amendment and the Voting Rights Act rather than of the Fourteenth Amendment. The issues tried thus included those implicated in *Shaw*. As the plaintiffs' claims are so closely related to the racial gerrymandering concerns in *Shaw*, we feel confident that had *Shaw* been decided before this case was initiated, the plaintiffs would have alleged a violation of the cause of action that that case establishes. Defendants argue that the Court's remand order and Federal Rule of Civil Procedure 15(b) prohibit us from allowing the plaintiffs to amend their complaint, but in fact both permit us to do so.

A. The Scope of the Remand. It is established law that "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to

other issues." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (quotation omitted) (citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)). This is known as the "mandate rule." *See Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.) (under the "mandate rule," a district court on remand "may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court."), *cert. denied*, 113 S. Ct. 125 (1992).[1]

Under the mandate rule, we may not reconsider the issues decided by the Supreme Court, which are laid out above. This is the relevant point made by the cases, cited by the defendants, which hold that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennyslvania R.R. Co.*, 334 U.S. 304, 306 (1948). However, the case law nevertheless allows us to consider issues which have not been decided. In this case, the Court expressly abstained from passing upon the type of Equal Protection Clause issue discussed in *Shaw*, because plaintiffs did not plead it nor did this court reach it in its earlier decision:

> Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here. Accordingly, we express no view on how such a claim might be evaluated.

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[1] *See also Pan-Pacific Union*, 987 F.2d 594, 596 (9th Cir. 1993) ("The district court may not reconsider matters decided by us on the first appeal, but it may address any issue that we did not dispose of either expressly or impliedly."); *Hester v. International Union of Operating Engineers*, 941 F.2d 1574, 1581 n.9 (11th Cir. 1991) (quotation omitted) ("Notwithstanding the law of the case doctrine, a district court on remand is free to address, as a matter of first impression, those issues not disposed of on appeal."); *Rutherford v. United States*, 806 F.2d 1455, 1459-60 (10th Cir. 1986); *Panama Process v. Cities Service Co.*, 789 F.2d 991, 994 (2d Cir. 1986).

113 S. Ct. at 1157. Thus, the Court's mandate does not prohibit us from considering that issue on remand.

The defendants stress that at one point in its opinion, the Court stated that it was remanding "only" for further proceedings on the population deviation issue. *Id.* at 1154. This statement, which comes at the end of the opinion's introductory section in which the Court summarizes the facts of the case, appears to indicate simply that the Court is remanding only the population claim and not the Voting Rights Act or Fifteenth Amendment ones. Though it is presumably within the Court's power to order us not to consider any other issues, this one-time use of the word "only" does not demonstrate that it meant to do so.

Because certiorari in *Shaw* had been granted before the Court's decision in this case, and because the oral argument in this case touched on the *Shaw* issue, the defendants also argue that it is meaningful that the Court could have discussed the *Shaw* issue but chose not to. However, these circumstances are irrelevant. The fact is that the Court did not expressly or impliedly resolve the issue that the plaintiffs' wish to allege, so we are not foreclosed from considering it.

B. Federal Rule of Civil Procedure 15(b). Rule 15(b) allows an amendment of pleadings that is necessary to cause them to conform to the issues that have been tried. Moreover, the Rule instructs that a court "shall [allow an amendment] freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits." [2]

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[2] Rule 15(b) provides:

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been

The defendants argue that it would be an abuse of discretion for this court to allow an amendment at this stage of the proceedings. They claim that it is well-established under *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1258-59 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2889 (1991), that it is an abuse of discretion for a court to amend a complaint late in the proceedings. However, *Prather* prohibited the amending of a complaint only because doing so in that case would be highly prejudicial to the defendant. Here, we do not think the defendants would be prejudiced by the amending. The following considerations assure us that justice demands that we allow the complaint to be amended.

First, the *Shaw* claim is closely linked to the earlier proceedings, such that the relevant facts have already been developed and the issues were in part explored in the earlier hearings.[3] The future litigation burden is correspondingly reduced, and this case involves competent attorneys on both sides who can easily make the adjustment to representing their clients with respect to the *Shaw* issue. Second, the contours of the cause of action established in *Shaw* were unclear until the issuance of the opinion in that case, so it is unfair for us to have expected the

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raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

[3] In fact, the defendants' claim that the Supreme Court oral argument touched on the *Shaw* issue shows how closely linked the issues are.

plaintiffs to have specifically articulated the issue earlier. Due to the closeness of the issues, we feel that the fact that *Shaw* had not yet been decided is the only reasonable explanation for why the plaintiffs did not make the specific claim previously. As just one example, the Plaintiffs' Proposed Findings of Fact, submitted prior to our earlier decision, contains a fourteen-page argument under the heading "1991 Plan Violates Ohio Constitution as a Result of Race Conscious Gerrymandering." R. —— at 114-28. We must assume that the plaintiffs would have alleged racial gerrymandering in violation of the Fourteenth Amendment as well, had such a cause of action been recognized.

If the plaintiffs have a meritorious constitutional claim here under *Shaw*, it would be unfair in the extreme for that challenge to go unheard simply because *Shaw* was decided after the complaint was filed. We therefore GRANT the plaintiffs' motion for leave to file a second amended complaint.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze
ANTHONY J. CELEBREZZE
Senior U.S. Circuit Judge

Dowd, Dissenting,

In my view, the recent decision of *Shaw v. Reno*, 113 S. Ct. 2816 (1993) dealing with Congressional redistricting for the State of North Carolina is anchored in a factual situation strikingly dissimilar to the reapportionment of Ohio for its General Assembly. As a consequence, I would deny the motion of the plaintiffs to file a second amended complaint. Accordingly, I respectfully dissent.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX F

[Filed May 26, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE, SR.
JUDGE DAVID D. DOWD, JR.

ORDER VACATING MEMORANDUM AND OPINION (DOCKET NO. 322) AND VACATING ORDER REGARDING ADMISSION OF TRIAL EXHIBITS (DOCKET NO. 320)

We hereby vacate the Memorandum and Opinion (Docket No. 322), previously filed in the instant case, and we vacate the Order Regarding Admission of Trial Exhibits (Docket No. 320), previously filed in the instant case.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze, Sr.
ANTHONY J. CELEBREZZE, SR.
U.S. Circuit Judge

DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX G

[Filed Jun. 23, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

ORDER

Judge Anthony J. Celebrezze's appointment/designation as a member of the three-judge district court in the case of *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio), is hereby extended, and he is authorized to act with the panel in this case until a final judgment has been entered pursuant to Federal Rule of Civil Procedure 54, and the case is (presumably) appealed to the United States Supreme Court. This order is entered so as to not substitute another judge prior to the entry of a final order. To bring another judge into the case at this juncture, a judge who has not been present at the hearings or participated in the case to date, would only serve to delay and confuse the case. Therefore, in the interest of an orderly administration of judicial business, this order is entered *nunc pro tunc* effective May 1, 1995.

Accordingly, it is so ORDERED.

ENTERED BY ORDER OF THE COURT

/s/ Gilbert S. Merritt
GILBERT S. MERRITT
Chief Judge

APPENDIX H

[Filed May 26, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE, SR.
JUDGE DAVID D. DOWD, JR.

NOTICE OF APPEAL

Notice is hereby given that George V. Voinovich, Robert A. Taft II, Stanley J. Aronoff and James R. Tilling, Defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the three-judge district court's Decision and Order of April 28, 1995 and its Order of May 9, 1995. This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

/s/ N. Victor Goodman
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[Certificate of Service Omitted in Printing]

APPENDIX I

[Filed Jun. 23, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

JUDGE NATHANIEL R. JONES
JUDGE DAVID D. DOWD, JR.

NOTICE OF APPEAL

Notice is hereby given that George V. Voinovich, Robert A. Taft II, Stanley J. Aronoff, and James R. Tilling, Defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from this court's Decision and Order of May 26, 1995 (D. 327). This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

/s/ N. Victor Goodman
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APPENDIX J

CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have

engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 294. Assignment of retired Justices or judges to active duty

(a) Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.

(b) Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake.

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certifi-

cate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

(e) No retired Justice or judge shall perform judicial duties except when designated and assigned.

28 U.S.C. § 295. Conditions upon designation and assignment

No designation and assignment of a circuit or district judge in active service shall be made without the consent of the chief judge or judicial council of the circuit from which the judge is to be designated and assigned. No designation and assignment of a judge of any other court of the United States in active service shall be made without the consent of the chief judge of such court.

All designations and assignments of justices and judges shall be filed with the clerks and entered on the minutes of the courts from and to which made.

The Chief Justice of the United States, a circuit justice or a chief judge of a circuit may make new designation and assignments in accordance with the provisions of this chapter and may revoke those previously made by him.

28 U.S.C. § 296. Powers upon designation and assignment

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is desig-

nated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

28 U.S.C. § 1253. Direct appeals from decisions of three judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith

and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any state-wide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result

if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

OHIO CONSTITUTION ARTICLE XI: APPORTIONMENT

§ 1 [Persons responsible for apportionment of state for members of general assembly.]

The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.

Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representative districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year one thousand nine hundred seventy-one and every tenth year thereafter. The governor shall give such persons two weeks advance notice of the date, time, and place of such meeting.

The governor shall cause the apportionment to be published no later than October 5 of the year in which it is made, in such manner as provided by law. (Enacted Nov. 7, 1967. Former § 1 repealed, see SJR 24, 107th General Assembly.)

§ 2 [Method of apportionment of state for members of general assembly.]

The apportionment of this state for members of the general assembly shall be made in the following manner: The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be

divided by the number "ninety-nine" and the quotient shall be the ratio of representation in the house of representatives for ten years next succeeding such apportionment. The whole population of the state as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment. (Enacted Nov. 7, 1967. Former § 2 repealed, see SJR 24, 107th General Assembly.)

§ 3 [Population of each house of representatives district.]

The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five percent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article. (Enacted Nov. 7, 1967. Former § 3 repealed, see SJR 24, 107th General Assembly.)

§ 4 [Population of each senate district.]

The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five percent nor more than one hundred five per cent of the ratio of representation in the senate as determined pursuant to this Article. (As enacted Nov. 7, 1967. Former § 4 repealed, see SJR 24, 107th General Assembly).

§ 5 [Representation.]

Each house of representatives district shall be entitled to a single representative in each General Assembly. Every senate district shall be entitled to a single senator in each General Assembly. (As enacted Nov. 7, 1967. Former § 5 repealed, see SJR 24, 107th General Assembly.)

§ 6 [Creation of district boundaries; change at end of decennial period.]

District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census and the ensuing apportionment or as provided in section 13 of this Article, notwithstanding the fact that boundaries of political subdivisions or city wards within the district may be changed during that time. District boundaries shall be created by using the boundaries of political subdivisions and city wards as they exist at the time of the federal decennial census on which the apportionment is based, or such other basis as the general assembly has directed. (As enacted Nov. 7, 1967. Former § 6 repealed, see SJR 24, 107th General Assembly.)

§ 7 [Boundary lines of house of representatives districts.]

(A) Every house of representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. To the extent consistent with the requirements of section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.

(B) Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards.

(C) Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named.

(D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article. (As enacted Nov. 7, 1967. Former § 7 repealed, see SJR 24, 107th General Assembly.)

§ 8 [Determination of number of house of representatives districts within each county.]

A county having at least one house of representatives ratio of representation shall have as many house of representatives districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining house of representatives district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation for the house of representatives determined under section 2 of this Article. (As enacted Nov. 7, 1967. Former § 8 repealed, see SJR 24, 107th General Assembly.)

§ 9 [When population of county is fraction of ratio of representation.]

In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the house of representatives, reasonable effort shall be made to

create a house of representatives district consisting of the whole county. (As enacted Nov. 7, 1967. Former § 9 repealed, see SJR 24, 107th General Assembly.)

§ 10 [Creation and numbering of house of representative districts.]

The standards prescribed in sections 3, 7, 8 and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:

(A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.

(B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

(D) The remaining territory of the state shall be combined into representative districts. (As enacted Nov. 7, 1967. Former § 10 repealed, see SJR 24, 107th General Assembly.)

§ 11 [Senate districts.]

Senate districts shall be composed of three contiguous house of representatives districts. A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under section 2 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in section 12 of this Article. (As enacted Nov. 7, 1967. Former § 11 repealed, see SJR 24, 107th General Assembly.)

§ 12 [Change in boundaries of senate districts.]

At any time the boundaries of senate districts are changed in any plan of apportionment made pursuant to any provision of this Article, a senator whose term will not expire within two years of the time the plan of apportionment is made shall represent, for the remainder of the term for which he was elected, the senate district which contains the largest portion of the population of the district from which he was elected, and the district shall be given the number of the district from which the senator was elected. If more than one senator whose term will not so expire would represent the same district by following the provisions of this section, the persons responsible for apportionment, by a majority of their number, shall designate which senator shall represent the district and shall designate which district the other senator or sen-

ators shall represent for the balance of their term or terms. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly. Former § 12 repealed May 7, 1968, HJR 42.)

§ 13 [Jurisdiction of supreme court, effect of determination of unconstitutionality; apportionment.]

The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article. In the event that any action of this Constitution relating to apportionment or any plan of apportionment made by the persons responsible for apportionment, by a majority of their number, is determined to be invalid by either the supreme court of Ohio, or the supreme court of the United States, then notwithstanding any other provisions of this Constitution, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment in conformity with such provisions of this Constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next regular apportionment in conformity with such provisions of this Constitution as are then valid.

Notwithstanding any provision of this Constitution or any law regarding the residence of senators and representatives, a plan of apportionment made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election.

The governor shall give the persons responsible for apportionment two weeks advance written notice of the date, time, and place of any meeting held pursuant to this section. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly. Former § 13 repealed May 7, 1968, HJR 42.)

§ 14 [District boundaries until January 1, 1973.]

The boundaries of house of representatives districts and senate districts from which representatives and senators were elected to the 107th general assembly shall be the boundaries of house of representatives and senate districts until January 1, 1973, and representatives and senators elected in the general election in 1966 shall hold office for the terms to which they were elected. In the event all or any part of this apportionment plan is held invalid prior to the general election in the year 1970, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment to be effective until January 1, 1973, in accordance with section 13 of this Article. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly.)

§ 15 [Severability provision.]

The various provisions of this Article XI are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly.)

95-132

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

Supreme Court, U.S.
FILED
AUG 25 1995
CLERK

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF TRIAL COURT

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77 pp

QUESTIONS PRESENTED

1. Did this Court, in remanding this case to the District Court, intend to circumscribe the District Court's inherent discretion to allow Appellees to amend their complaint to challenge Appellants' admitted use of race in drawing district lines as a conscious attempt to separate voters by race pursuant to *Shaw v. Reno*, 113 S. Ct. 2816 (1993)?

2. Where Appellees have suffered a cognizable injury as a result of residing in districts that admittedly were drawn on the basis of race, do Appellees have standing to challenge Appellants' apportionment plan in its entirety?

3. Where the Appellant majority members of the Apportionment Board have abdicated their responsibility to the electorate of Ohio to create a lawful redistricting plan, do Appellees, as dissenting members of the Board, have standing to challenge Appellants' plan in its entirety?

4. Where Appellants have admitted that voting district lines were drawn on the basis of race, must the District Court's finding that those racially-based districts violate the Fourteenth Amendment be reversed because the District Court, without the benefit of this Court's holding in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), articulated its test of unconstitutionality as "race as a motivating factor" instead of "race as the predominant factor motivating the legislature's decision"?

5. Does Appellants' unfounded fear of a legal challenge to their reapportionment plan under the Voting Rights Act constitute a compelling state interest justifying Appellants' admitted use of race in drawing district lines?

6. Was the District Court barred from considering the merits of Appellees' complaint by an unrelated decision of the Ohio Supreme Court that did not address the issues presented in Appellees' complaint?

7. Where the opinions and orders appealed from were not accompanied by a judgment entry and have been vacated and replaced by a subsequent opinion, which was accompanied by a judgment entry, is there a final appealable order from which appeal may be taken?

LISTING OF ADDITIONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Secretary to the Apportioning Persons.

Appellees

THOMAS R. FERGUSON, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, TYRONE RILEY, RICHARD CORDRAY, PAUL MECHLING, RONALD GERBERRY, Representative of the 65th Ohio House District, MARY ABEL, Representative of the 78th Ohio House District, and WILLIAM MALLORY.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LISTING OF ADDITIONAL PARTIES	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
I. APPELLANTS' APPEAL DOES NOT PRESENT SUBSTANTIAL QUESTIONS	7
II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING APPELLEES TO AMEND THEIR COMPLAINT TO CHALLENGE APPELLANTS' ADMITTED USE OF RACE IN DRAWING DISTRICT LINES UNDER SHAW	9
III. APPELLEES HAVE SUFFERED A COGNIZABLE INJURY AND, THEREFORE, HAVE STANDING TO CHALLENGE APPELLANTS' PLAN IN ITS ENTIRETY	13
IV. THE DISTRICT COURT CORRECTLY APPLIED STRICT SCRUTINY TO APPELLANTS' PLAN BASED ON THE OVERWHELMING EVIDENCE THAT APPELLANTS DREW DISTRICT LINES ON THE BASIS OF RACE	16
V. APPELLANTS HAD NO COMPELLING INTEREST FOR THEIR ADMITTED USE OF RACE IN DRAWING DISTRICT LINES	21

TABLE OF CONTENTS—Continued

Page

VI. THERE WAS NO PROCEDURAL BAR TO THE DISTRICT COURT'S DETERMINATION THAT APPELLANTS' PLAN IS UNCONSTITUTIONAL 23

CONCLUSION 26

APPENDIX 1a

A. *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio Aug. 11, 1995) (D. 342) 1a

TABLE OF AUTHORITIES

CASES — Page

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) 18, 19
Burford v. Sun Oil Co., 319 U.S. 315 (1943) 26
Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) 16
City of Columbia v. Paul N. Howard Co., 707 F.2d 338 (8th Cir.), *cert. denied*, 464 U.S. 893 (1983) .. 10
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 18
Coleman v. Miller, 307 U.S. 433 (1939) 15
Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 25
Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) 18
Eisenstadt v. Baird, 405 U.S. 438 (1972) 16
G. & C. Merriam Co. v. Saalfield, 241 U.S. 22 (1916) 12
Growe v. Emison, 113 S. Ct. 1075 (1993) 25
In re Voinovich, 114 S. Ct. 2156 (1994) 6
Jones v. Lewis, 957 F.2d 260 (6th Cir.), *cert. denied*, 113 S. Ct. 125 (1992) 11
Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) 15
Miller v. Johnson, 115 S. Ct. 2475 (1995) ..... *passim*
Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) 18
Quern v. Jordan, 440 U.S. 332 (1979) 9, 10, 11, 12
Quilter v. Voinovich, 157 F.R.D. 36 (N.D. Ohio 1994) 5-6, 10
Quilter v. Voinovich, 794 F. Supp. 695 (N.D. Ohio 1992) 2, 4, 5
Quilter v. Voinovich, 794 F. Supp. 756 (N.D. Ohio 1992) 2
Quilter v. Voinovich, 794 F. Supp. 760 (N.D. Ohio 1992) 2
Quilter v. Voinovich, 1992 WL 677145 (N.D. Ohio Mar. 19, 1992) 2, 21-22
Quilter v. Voinovich, No. 5:91CV-2219 (N.D. Ohio Aug. 11, 1995) 6

TABLE OF AUTHORITIES—Continued

Page

Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) .. 18
Shaw v. Reno, 113 S. Ct. 2816 (1993) ..... *passim*
Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) 9, 10-11, 12
United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990) 16
United States v. Hays, 115 S. Ct. 2431 (1995) 7, 13, 14
Voinovich v. Ferguson, 63 Ohio St. 3d 198 (1992) .. 23, 24
Voinovich v. Quilter, 113 S. Ct. 1149 (1993) ..... *passim*
Worley v. Columbia Gas of Ky., 491 F.2d 256 (6th Cir. 1973), *cert. denied*, 417 U.S. 970 (1974) 12
Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 18
Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321 (1971) 10

STATUTES

28 U.S.C. § 1253 2
28 U.S.C. § 1738 23
42 U.S.C. § 1973 4
Ohio Constitution, Article XI, § 1 15
Ohio Constitution, Article XI, § 7(D) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. ———

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF TRIAL COURT

OPINIONS BELOW

The April 28, 1995 Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 1a.

The May 9, 1995 Order of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 81a.

The May 26, 1995 Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 82a.

The March 31, 1994 Opinions and Orders of the three-judge District Court have been officially reported at 847 F. Supp. 579 and 157 F.R.D. 36, and also are set forth in Appellants' Appendix at App. 128a and 145a.

The May 26, 1995 Order Vacating Memorandum Opinion (Docket No. 322) and Vacating Order Regarding Admission of Trial Exhibits (Docket No. 320) of the three-judge District Court has not been officially reported. It is set forth in Appellants' Appendix at App. 153a.

The June 23, 1995 Order of Chief Judge Merritt of the United States Court of Appeals for the Sixth Circuit has not been officially reported. It is set forth in Appellants' Appendix at App. 155a.

The August 11, 1995 Opinion of the three-judge District Court has not been officially reported. It is set forth in Appellees' Appendix at App. 1a.[1]

JURISDICTION

The Orders appealed from were filed by the three-judge District Court on April 28, 1995, May 9, 1995, and May 26, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

STATEMENT OF THE CASE

In Ohio, unlike many other states, the authority to reapportion following a decennial census is conferred upon an Apportionment Board (the "Board"), which acts within narrowly confined limits set by the Ohio Constitution. Ohio Constitution, Article XI. The 1991 Board consisted of Appellants George V. Voinovich, Governor of the State of Ohio, Robert A. Taft II, Secretary of State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Appellees Thomas E. Ferguson, then Auditor of the State of Ohio and Barney Quilter, then Speaker

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[1] Other prior opinions and orders in this case include *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993); *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992); *Quilter v. Voinovich*, 794 F. Supp. 756 (N.D. Ohio 1992); *Quilter v. Voinovich*, 1992 WL 677145 (N.D. Ohio Mar. 19, 1992); *Quilter v. Voinovich*, 794 F. Supp. 760 (N.D. Ohio 1992).

Pro Tempore of the Ohio House of Representatives.[2] The majority members of the Board appointed James R. Tilling ("Tilling") as its Secretary; Tilling's primary function was to create a plan of apportionment.

Tilling, at the direction of the majority Board members, set about his task with the specific purpose of consciously separating voters by race by seeking to guarantee the election of new (non-incumbent) black legislators. As set forth in the Board's Findings of Fact and Conclusions of Law ("Board Findings"), adopted by the majority Board members on February 18, 1992, the Board acted under the premise that during the decade of the 1990's, some or all of Ohio's incumbent black legislators might retire, die or move on to other political posts. Board Finding No. 172, D. 147, Ex. A at 73. With that assumption as his guide, Tilling drew lines to "ensure" that a black incumbent's replacement (always assumed to be another black) would be elected. *Id.* at 71.[3]

The direct evidence that the Board, and Tilling, primarily were motivated by race in drawing district lines is overwhelming. In addition to the numerous admissions in the Board's Findings, D. 147, Tilling's handwritten

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[2] Board members Voinovich, Taft and Aronoff constitute the majority Board members; Board members Ferguson and Quilter are the dissenting Board members.

[3] The Board, in its Findings, attempted to justify its actions by relying on a regression analysis of the effect of incumbency in elections in Ohio minority districts for the years 1984, 1986, 1988 and 1990. Board Finding No. 173, D. 147, Ex. A at 73. Dr. King, Appellants' expert, found that for those years, black incumbents had an election advantage of 6-10% over non-incumbents. *Id.* To ensure that a new black candidate, running without the incumbency advantage, would be guaranteed election, Tilling drew race-based district lines calculated to provide new black candidates with election margins of not less than 68% and as high as 81%, averaging 77.6%. *Id.* at 75. Black incumbents themselves would be elected under Tilling's plan by margins of no less than 75% and as high as 89%, averaging 80%. *Id.* Tilling himself admitted that such electoral margins constitute "landslides." D. 312 at 313.

notes and maps, D. 154, Ex. 120, contain substantial direct evidence of race-based line drawing. Tilling's notes prove that Tilling began the redistricting process by displaying the minority populations of each urban county on his computer screen and drawing "minority districts" first, before attempting to ascertain which pre-existing districts could have been retained, as required by Ohio Constitution Article XI, § 7(D). D. 154, Ex. 120. For example, Tilling's notes state, with respect to Franklin County, "[a]void primarily white Bexley and Whitehall." *Id.* In Hamilton County, Tilling's notes confirm his intention to "start with majority-minority districts, begin around the downtown area and configure a district including the greatest portion of the eastern segment of black population, mostly City of Cincinnati." *Id.* at p. 4. In his notes regarding Summit County, Tilling's intent was to "try to maximize the minority voters in [Verson Sykes'] district." *Id.* at 6.

On November 1, 1991, Appellees commenced this action in the United States District Court for the Northern District of Ohio challenging the apportionment plan adopted by the Board on October 1, 1991.[4] D. 1. In their complaint, Appellees alleged that the Board's conscious use of race in redistricting violated § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. *Id.* On January 31, 1992, the District Court ruled that Amendment C violated § 2 of the Voting Rights Act. *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992). Specifically, the District Court concluded that there was "no legal mandate or finding of a Voting Rights Act violation to justify [Appellants'] creation of majority-minority districts wherever possible in the 1991 Apportionment Plan", and directed the Board either to show

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[4] That plan was designated "Amendment C". D. 154, Ex. 17 at 9-14.

justification for its use of race in drawing districts or to submit a revised plan within twenty days. *Id.* at 701-02.

In response to the District Court's directive, the majority Board members, on February 18, 1992, signed and submitted to the District Court their Findings of Fact and Conclusions of Law. D. 147, Ex. A. Immediately following the adoption of their Findings, the majority members of the Board also adopted Amendment D, the plan at issue in this case. *Id.* at 107. Amendment D contained "technical corrections" to the draft plan (Amendment C), and reduced the number of majority-minority districts from eight to five. *Id.*; D. 147, Ex. C at 59. However, Amendment D perpetuated the race-based redistricting of Amendment C.

On March 10, 1992, the District Court again ruled that Appellants' use of race in redistricting was not justified, and held that Amendment D violated § 2 of the Voting Rights Act and the Fifteenth Amendment. *Quilter v. Voinovich*, 794 F. Supp. 756, 737 (N.D. Ohio 1992). On appeal, this Court found that the evidence presented by Appellants failed to demonstrate "sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice." *Voinovich v. Quilter*, 113 S. Ct. 1149, 1158 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986)). In that same opinion, this Court reversed the District Court's findings of violations of the Voting Rights Act and the Fifteenth Amendment, and remanded the case to the District Court for a determination of whether the plan's deviation from equal population among districts violated the Fourteenth Amendment. 113 S. Ct. at 1154.

Following remand, Appellees sought to leave to amend their complaint to challenge Appellants' admitted use of race in their plan as a violation of the Fourteenth Amendment, as recognized by this Court in *Shaw v. Reno*, 113 S. Ct. 2816 (1993). D. 246. Appellees' request was granted by the District Court on March 31, 1994. *Quilter*

v. Voinovich, 157 F.R.D. 36, 37 (N.D. Ohio 1994).[5] Appellees' *Shaw* claim was tried to the District Court on November 16-17, 1994. Once again, Appellants' plan was found to be unconstitutional. Specifically, on April 28, 1995, the District Court held that race was "a substantial and motivating factor" in the creation of at least House Districts 21, 22, 30, 31, 38, 39, 44 and 49, *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio Apr. 28, 1995), Appellants' App. 1a at 34a, and directed Appellants to redraw those eight districts. *Id.* at 39a. Appellants filed a notice of appeal from that Opinion and Order, despite the fact that final judgment had not been entered.[6] D. 329.

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[5] Appellants, understandably displeased by this Court's holding in *Shaw*, attempted to shield their plan from review under that standard by petitioning this Court for a writ of mandamus directing the District Court to decide only the "one person, one vote" issue. However, Appellants' petition was denied. *In re Voinovich*, 114 S. Ct. 2156 (1994).

[6] Appellants have not complied with the District Court's Order. On May 25, 1995, Appellants filed a motion to stay the District Court's Order (D. 330), arguing, in part, that Appellees and the citizens of Ohio would not be injured if *yet another* election were held under an apportionment plan that has twice been declared unconstitutional. Before the District Court ruled on that motion, Appellants filed a similar motion to stay in this Court. The District Court overruled Appellants' motion to stay on August 17, 1995. D. 351.

On May 26, 1995, the District Court vacted its April 28 Opinion (D. 325, Appellants' App. 153a) and issued an amended Opinion that disposed of Appellants' erroneous (and disingenuous) argument that the Board had not drawn district lines on the basis of race but, rather, had followed the mandates of the Ohio Constitution. Appellants' App. 82a at 123a-126a and n.19. By explaining the multiple ways in which Appellants' plan violates the Ohio Constitution, the District Court exposed Appellants' argument as a sham. *Id.* Appellants requested that the District Court vacate that modified Opinion. D. 333.

On August 11, 1995, the District Court again clarified its holding by vacating its prior Opinion (D. 341) and issuing a new Opinion framing its analysis of the facts in terms of the standard

I. APPELLANTS' APPEAL DOES NOT PRESENT SUBSTANTIAL QUESTIONS

Substantial questions of law deserving of this Court's attention are not presented by Appellants' appeal. Since the last decennial census, this Court has addressed substantial issues relating to the use of race in the creation of voting districts; through those cases,[7] this Court has provided apportioning bodies with significant guidance in drawing district lines. By contrast, this Court's resolution of the questions presented by Appellants' appeal, which largely are procedural, will add little or nothing to the jurisprudence in this area.

Having made numerous admissions that many districts were drawn on the basis of race, Defendants understandably are alarmed by this Court's recent pronouncements, and are attempting to avoid the impact of those precedents by raising procedural barriers to the District Court's consideration of the merits of their plan. Appellants' appeal of these procedural issues trivializes the role of this Court.

This Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Vinson, C.J., Address to the American Bar Ass'n, Sept. 7, 1949, 69 S. Ct. v, vi. Rather, "[t]he Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional

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articulated by this Court in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). D. 342, Appellees' App. 1a. In that Opinion, the District Court confirmed that, based upon the evidence presented at trial, race was the predominant factor motivating the decision of the majority Board members. *Id.* at 34a-35a. Simultaneously with the filing of this Opinion, the District Court, for the first time, entered judgment in favor of Appellees and against Appellants. D. 344.

[7] *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993); *Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *United States v. Hays*, 115 S. Ct. 2431 (1995).

questions, and other important questions of law for the public benefit." Taft, C.J., Hearings Before the House Committee on the Judiciary, 67th Cong., 2d Sess., ser. 33, at 2 (1922). While the outcome of this case is important to the parties, and to the candidates and voters in the Ohio state legislative districts affected by the District Court's Orders, the questions that Appellants ask this Court to decide will determine the rights only of this limited group of persons and are of little or no interest to the general public.

Procedural questions such as the District Court's discretion to allow amendment of the complaint after remand, or Appellees' standing to challenge a redistricting plan that admittedly was drawn on the basis of race, present issues that are limited to the unique facts of this case. Similarly, the issue of whether, in this particular case, the constitutionality of Appellants' plan has been addressed directly by the Ohio Supreme Court (which it has not), thus requiring abstention by the District Court, does not present this Court with the opportunity to decide an issue of significant precedential value. Since this Court's resolution of the procedural issues presented by Appellants' appeal will not settle substantial questions of great or lasting importance, consideration of those issues by this Court does not constitute a wise allocation of judicial resources.[8]

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[8] It is questionable whether this appeal is from a final, appealable order. Appellants appeal from the District Court Opinions filed on April 28 and May 26, 1995. Jurisdictional Statement, pp. 6-7 n.7. Both of those Opinions have been vacated. D. 325; D. 341. Moreover, no judgment was entered by the District Court until August 11, 1995. D. 344.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING APPELLEES TO AMEND THEIR COMPLAINT TO CHALLENGE APPELLANTS' ADMITTED USE OF RACE IN DRAWING DISTRICT LINES UNDER SHAW

The District Court did not violate this Court's mandate in *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), by granting Appellees leave to amend their complaint to challenge Appellants' admitted use of race in drawing voting districts as an illegal separation of voters by race under the Fourteenth Amendment, a claim recognized by this Court in *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993). Appellees' *Shaw* claim was not among the matters decided by this Court in *Voinovich*—in fact, this Court expressly declined to make such a decision, 113 S. Ct. at 1157—and, in accordance with the "mandate rule" articulated in such cases as *Quern v. Jordan*, 440 U.S. 332 (1979), and *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939), the District Court could not have violated the *Voinovich* mandate when it allowed Appellees to assert that claim on remand.

In *Voinovich*, this Court did *not* consider or make any determination as to whether Appellants' plan violates the Fourteenth Amendment because the plan consciously and intentionally separates voters by race. Rather, this Court explicitly noted that a race-conscious redistricting claim under the Fourteenth Amendment had not been presented by the parties or adjudicated by the District Court, and this Court expressly disclaimed any opinion regarding the validity of such a claim. *Voinovich*, 113 S. Ct. at 1157. Appellees, of course, could not have raised a "*Shaw*" claim in the District Court; *Shaw*, which holds that the use of race in drawing voting district lines (such as Appellants admit occurred in Ohio) may violate the Fourteenth Amendment, was not decided until approximately three months after *Voinovich*.

It is axiomatic that since the claim raised by Appellees' amended complaint was not within the scope of the case when considered by this Court, that claim was not within the scope of, and was not foreclosed by, this Court's mandate on remand. With respect to the Fourteenth Amendment violation defined in *Shaw*, this Court stated in *Voinovich* (which was decided three months before *Shaw*):

> "Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here. Accordingly, *we express no view on how such a claim might be evaluated.*"

Voinovich, 113 S. Ct. at 1157 (emphasis added).

After this Court's ruling in *Shaw*, Appellees sought leave to challenge Appellants' admitted use of race in their plan under the cause of action recognized in *Shaw*; specifically, Appellees alleged that Appellants' race-conscious redistricting violates the Fourteenth Amendment as an intentional separation of voters by race. D. 258. The District Court granted Appellees leave to file their amended complaint, *Quilter*, 157 F.R.D. at 37, and subsequently found that, based upon the overwhelming evidence that race was the primary motivating factor in the creation of Appellants' plan, Appellants' actions in fact violate the Fourteenth Amendment. Appellants' App. 1a at 38a.

As Appellants concede, Jurisdictional Statement, p. 11, the amendment of pleadings is within the sound discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330 (1971). While the District Court may not reconsider issues decided and, therefore, foreclosed by the Supreme Court, " 'on the remand a lower court is free as to other issues.' " *Quern*, 440 U.S. at 347 n.18 (quoting *Sprague*, 307 U.S. at 168). *Accord, City of Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 341

(8th Cir.), *cert. denied*, 464 U.S. 893 (1983) ("An amendment can be proper after remand to the district court even if the claim was presented for the first time on appeal or had not been presented to the district court in a timely fashion.")

In the face of this authority, Appellants cite, out of context, the statement of this Court that it was remanding this case "only" for further proceedings on the population deviation issue. *Voinovich*, 113 S. Ct. at 1154. The District Court correctly understood this Court's use of the word "only" to mean, in context, that this Court was remanding only one of the three issues presented to it, thus foreclosing further consideration by the District Court of Appellees' Voting Rights Act claim and Fifteenth Amendment claim. As the District Court correctly noted "[t]hough it is presumably within the Court's power to order us not to consider any other issues, this one-time use of the word 'only' does not demonstrate that it meant to do so." Appellants' App. 145a at 149a.[9]

The "mandate rule" announced in *Sprague*, 307 U.S. at 168, and followed in *Quern*, 440 U.S. at 347, provides that the authority of a district court to allow a complaint to be amended following remand from a higher court is controlled by the law of the case doctrine. "As with all applications of the law of the case doctrine, the trial court may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court." *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.), *cert. denied*, 113 S. Ct. 125 (1992). Thus, under the mandate rule, the District Court could not reconsider Appel-

[9] Appellants suggest that since *Shaw* was pending before this Court at the time that *Voinovich* was decided, this Court somehow could have anticipated its future ruling and remanded this case for a determination of whether Appellants' admitted use of race in redistricting violated the principles set forth in *Shaw*. Jurisdictional Statement, p. 10. Appellants' argument that this Court could have remanded this case for further proceedings consistent with future law should be rejected.

lees' claims under the Voting Rights Act or the Fifteenth Amendment, the only claims actually resolved by this Court. However, " 'on the remand [the] lower court [was] free as to other issues.' " *Quern*, 440 U.S. at 347 n.18 (quoting *Sprague*, 307 U.S. at 168).

Appellants derive from this Court's use of the word "only" the application of some new form of *res judicata* that ascribes to the law of the case doctrine—concerning matters actually decided—the characteristics of merger and bar that might follow a final judgment. Jurisdictional Statement, pp. 9-12. What is lacking here, however, is a final judgment. It is "familiar law that only a final judgment is *res judicata*," *G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 28 (1916), and until there is a final judgment, the District Court's Orders remain interlocutory and subject to modification at any time, except to the extent that this Court determines particular issues upon an intervening appeal. Since this Court declined to address the *Shaw* claim (a claim that had not yet been recognized by this Court) in this case, *Voinovich*, 113 S. Ct. at 1157, the District Court did not exceed the scope of this Court's remand in proceeding to do so.[10]

This Court's mandate in *Voinovich* did not limit the District Court's inherent authority to grant Appellees' motion to file an amended complaint to assert a claim (not addressed on appeal) that Appellants' admitted con-

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[10] Appellants' reliance upon *Worley v. Columbia Gas of Ky.*, 491 F.2d 256, 265 (6th Cir. 1973), *cert. denied*, 417 U.S. 970 (1974) for the proposition that there is an absolute bar to amending a complaint after remand where the amendment raises issues not within the theory on which the case was tried is without merit. In *Worley*, the judgment of the district court was reversed and the case remanded with specific instructions that it be dismissed. Since the appellate court made a final disposition of the case, the district court was without authority to consider any further claims. Here, this Court did not limit the District Court's authority on remand, and the District Court did not err in allowing Appellees to amend their complaint.

scious use of race in redistricting violated the Fourteenth Amendment. Appellants' attempt to raise a procedural error where none exists is meritless, and the District Court's proper exercise of its discretion should be upheld by this Court.

III. APPELLEES HAVE SUFFERED A COGNIZABLE INJURY AND, THEREFORE, HAVE STANDING TO CHALLENGE APPELLANTS' PLAN IN ITS ENTIRETY

Since some Appellees have suffered a cognizable injury as a result of residing in districts admittedly created on the basis of race, Appellees properly may maintain this action. In *United States v. Hays*, 115 S. Ct. 2431 (1995), this Court held that redistricting legislation cannot be challenged except by persons who have suffered an injury as a result of the illegal redistricting. "Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge *the legislature's action*." *Id.* at —— (emphasis added).

In *Hays*, since none of the plaintiffs resided in the single district that had been gerrymandered under the redistricting plan in question, this Court concluded that none of the *Hays* plaintiffs had suffered cognizable injury. As a result, those persons all lacked standing to challenge that redistricting plan. *Hays*, 115 S. Ct. at ——. By contrast, Appellants concede that Appellees in the present case reside in at least four out of the eight specific districts that Appellants admittedly racially gerrymandered under their plan. Jurisdictional Statement, p. 13-14. Nonetheless, Appellants make the misguided argument that Appellees have standing only to challenge the redistricting of those particular districts in which they reside. *Id.*

Appellants misunderstand the interrelationship between a plaintiff's "injury," a plaintiff's "standing," and the claim

that an injured plaintiff has standing to pursue, as articulated in *Hays*. *Hays* provides that a plaintiff who does not reside in a gerrymandered district is not injured by the gerrymander and, therefore, lacks standing to challenge the plan that contains the gerrymander. *Hays*, 115 S. Ct. at ——. Conversely, a plaintiff who resides in a gerrymandered district *is injured* by the gerrymander and, therefore, has standing to challenge *the plan* that created the injurious gerrymander.

Contrary to Appellants' argument, Jurisdictional Statement, pp. 13-14, *Hays* does not suggest that an injured plaintiff with conceded standing to challenge a redistricting plan must limit his challenge to the geographical part of the plan (*i.e.*, the district) in which he or she resides. As this Court held in *Hays*, a plaintiff who actually is injured by a redistricting plan has standing challenge the plan *as a whole*:

> "*Appellees insist that they challenged Act 1 in its entirety*, not District 4 in isolation. . . . *That is true.* It is also irrelevant. The fact that Act 1 affects all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean—even if Act 1 inflicts race-based injury on some Louisiana voters—that every Louisiana voter has standing to challenge Act 1 as a racial classification. *Only those citizens able to allege injury 'as a direct result of having personally been denied equal treatment,' . . . may bring such a challenge . . . .*"

Hays, 115 S. Ct. at —— (emphasis added; citation omitted). In *Hays*, none of the plaintiffs resided in the gerrymandered district and, accordingly, none had standing to challenge the plan. In the present case, Appellees reside in at least four gerrymandered districts and, therefore, have standing to challenge the plan in its entirety.[11]

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[11] If the contrary view advanced by Appellants were accepted, such that an injured party could only complain about his or her

Moreover, two of the Appellees in this case are the dissenting members of Ohio's Apportionment Board. Under the explicit terms of Ohio's Constitution, Article XI, § 1, those Appellees, as members of the Apportionment Board, are responsible for redistricting in Ohio. Where the majority members of the Board have abdicated their constitutional responsibility to the electorate of Ohio to create a lawful redistricting plan, the dissenting members have suffered a cognizable injury as a result of being unable to fulfill their duty to create legal voting districts; thus, the dissenting Board members have standing to challenge the redistricting plan in its entirety. *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (state legislators have standing to challenge state court ruling invalidating statutes that the legislators wished to enforce: "We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes."); *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974) ("[A]n individual legislator has standing to protect the effectiveness of his vote.")

Appellee Board members also have standing to remedy the injury suffered by those members of the electorate who are resident in all of the unconstitutionally drawn districts and who necessarily are injured by Appellants' illegal acts. Third-party, or *jus tertii*, standing often has been recognized by this Court where (1) the plaintiff has suffered his or her own injury-in-fact; (2) he or she has a legal relationship with the person whose additional injury is being asserted; and (3) the litigation will have

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single district in a redistricting plan, then an absurd situation would result. Under Appellants' theory, every complaint asserting a claim of impermissible race-based districting in a state's redistricting plan would have to include, at a minimum, at least one plaintiff from *every* district in the state; otherwise, there might not be a plaintiff with standing under Appellants' theory to assert that claim with respect to a particular district if evidence of racial gerrymandering in that district were uncovered during discovery. In Ohio, Appellants' theory requires that every redistricting challenge be brought by a minimum of 99 plaintiffs.

a material impact on those third-party interests. *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989); *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 719-21 (1990). Where, as here, the material impact of the litigation will impact the rights of a significant segment of Ohio voters, not party to this case, recognition of standing *jus tertii* is appropriate. *Caplin & Drysdale*, 491 U.S. at 623 n.3.

Appellants' attempt to extend *Hays* to preclude a review of their race-based redistricting plan on its merits should be rejected, and Appellants' appeal should be dismissed.

IV. THE DISTRICT COURT CORRECTLY APPLIED STRICT SCRUTINY TO APPELLANTS' PLAN BASED ON THE OVERWHELMING EVIDENCE THAT APPELLANTS DREW DISTRICT LINES ON THE BASIS OF RACE

Despite the overwhelming evidence—primarily from Appellants' own witnesses and documents—that district lines were drawn on the basis of race, Appellants attempt to justify their actions by arguing that (1) the District Court, without the benefit of this Court's opinion in *Miller*, worded its test of unconstitutionality in a manner somewhat different from the standard ultimately articulated by this Court; and (2) under the standard articulated in *Miller*, Appellants' admitted use of race in drawing district lines does not rise to the level of unconstitutionality. Both of these arguments are without merit.

The District Court, after considering the admissions set forth in the Board's Findings and Tilling's handwritten notes, correctly determined that race was *a motivating factor* in Appellants' plan. However, the District Court's formulation of this test does not suggest that Appellees did not demonstrate that race was the "predominant factor motivating the legislature's decision", *Miller*, 115 S. Ct. at ——, or that the District Court did not con-

sider Appellants' plan to be illegal under this standard. In fact, the evidence before the District Court overwhelmingly demonstrates that Appellants predominantly were motivated by race.

In *Shaw*, this Court held that "[b]y perpetuating . . . notions [of racial stereotypes], a racial gerrymander may exacerbate the very patterns of racial bloc voting that the majority-minority districting is sometimes said to counteract." 113 S. Ct. at 2827. Similarly, under *Miller*, redistricting is impermissibly race-based where "race [is] the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." 115 S. Ct. at ——.[12] That the District Court found as fact in the present case that race was "the prodominant factor motivating" the Board's line drawing with respect to eight specific districts cannot reasonably be questioned.

The "central purpose" of the Equal Protection Clause of the Fourteenth Amendment "is to prevent the States

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[12] Appellants argue that *Miller* invalidates only the "violation" of traditional districting principles. Jurisdictional Statement, pp. 17-18. Appellants confuse "subordination" with "violation." When traditional districting principles are employed to implement impermissible racial classifications, they are "subordinated" to, but not necessarily violated by, such racial considerations. This is precisely what this Court proscribed in *Miller*: " '[E]very [objective districting] factor that could realistically be subordinated to racial tinkering in fact suffered that fate.' " *Miller*, 115 S. Ct. at —— (citation omitted). "While the boundaries . . . do indeed follow many precinct lines, this is because Ms. Meggers designed the Eleventh District along racial lines, and race data was most accessible to her at the precinct level.' " *Id.* at —— (citation omitted).

In the present case, even if Appellants did not violate the Ohio Constitution or other districting principles (which they did), they subordinated those principles to racial considerations. The evidence before the District Court overwhelmingly was that Appellants classified voters and candidates by race, and then drew the lines based upon those racial classifications.

from purposefully discriminating between individuals on the basis of race." *Shaw*, 113 S. Ct. at 2824. Racial classifications by state agencies, such as the Board, "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). The use of racial classifications also promotes "impermissible racial stereotypes" that adversely affect the proper development of our society. *Shaw*, 113 S. Ct. at 2827. "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991).

Because of these harms, this Court views racial classifications as "presumptively invalid." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). Accordingly, "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest. *Shaw*, 113 S. Ct. at 2825 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986)). "These principles apply not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race-neutral, are, on their face, 'unexplainable on grounds other than race.'" *Shaw*, 113 S. Ct. at 2825 (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)).

Given the path of this Court's jurisprudence, the District Court's conclusion that "the Supreme Court in *Reno* 'intended to place race-based redistricting legislation into the same category as all other forms of race-based state action after *Croson*, for purposes of analysis under the Equal Protection Clause,'" Appellants' App. at 12a (quoting *Shaw v. Hunt*, 861 F. Supp. 408, 429 (E.D.N.C. 1994)), was reasonable. As the District Court noted,

Appellants' App. at 16a, this Court held in *Arlington Heights* that:

> "*Davis* does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated *solely* by a single concern, or even that a particular purpose was the "*dominant*" or "*primary*" one . . . When there is a proof that a discriminatory purpose has been *a motivating factor* in the decision, . . . judicial deference is no longer justified."

429 U.S. at 265-66. Thus, understandably failing to anticipate the strict scrutiny standard pronounced by this Court in *Miller* ("race as the predominant motivating factor"), 115 S. Ct. at ——, the District Court adopted as its trigger for strict scrutiny race as a motivating factor. Appellants' App. at 16a. However, the District Court's adoption of this standard does not diminish the overwhelming direct evidence that race was the predominant factor motivating the Board's actions, and the District Court's findings of fact are not inconsistent with such a conclusion.[13]

Appellants' efforts to convince this Court that the District Court had insufficient evidence of predominant racial motivation before it are ludicrous. Appellants' efforts to avoid strict scrutiny of their actions have progressed through an embarrassing and increasingly disingenuous

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[13] On August 11, 1995, the District Court modified its Opinion to aid the parties with respect to this appeal by analyzing the facts under the *Miller* standard and reaffirmed that, based upon the evidence, Appellants' plan is impermissibly race-based. The District Court concluded that, under *Miller*, "[u]sing race as the predominant factor to draw lines to concentrate black voters in discrete legislative districts with the reciprocal effect of siphoning off and reducing their influence in other districts, without legally cognizable justification, is incompatible with the Constitution, as now interpreted by the Supreme Court." Appellees' App. at 42a.

series of positions from "we had to use race-based lines to comply with the Voting Rights Act," to "we used race, but we had a compelling justification," to "although we may have been conscious of race, it was not the predominant motivating factor in any of our redistricting." Appellants' next argument undoubtedly will be "we were unaware that any black voters resided in Ohio."

This Court has recognized that, in most cases, it is difficult to distinguish between simple race-awareness or race-consciousness, and the use of race as a basis for governmental action. "The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race." *Shaw*, 113 S. Ct. at 2826. In this case, however, a racial gerrymander has been established by overwhelming direct evidence. As set forth in the Board's Findings, Tilling's handwritten notes, and as reflected in the Board's implementation of its strategy of guaranteeing election of new black candidates on a county-by-county basis, Appellants engaged in race-based line drawing. Therefore, the District Court did not err in ordering Appellants to remedy Appellees' injury by redrawing those districts that violate the Fourteenth Amendment.

Appellants attempt to dismiss the extensive admissions of race-based districting contained in Tilling's handwritten notes, and in the Board's Findings, as the "only two items" of " 'direct evidence' " that the District Court could cite to establish racial gerrymandering. Jurisdictional Statement, p. 18. Those "two items" constitute direct evidence of Appellants' conscious separation of voters by race.

Appellants argue that Tilling's handwritten notes are "completely irrelevant" because they relate to Amendment C. *Id.* at 18-19 and n.18. Appellants do not inform the Court that the unconstitutional line drawing in the challenged plan (Amendment D) was derived from

the draft plan (Amendment C). Tilling's race-based lines in Amendment C (as shown by his notes) were not abandoned or replaced by the adoption of Amendment D.

Appellants also argue that the Board's Findings are similarly irrelevant because they "merely constitute a *post hoc* rationalization for the plan eventually adopted." Jurisdictional Statement, p. 19. What Appellants euphemistically call a "*post hoc* rationalization" is a signed document that spells out the numerous ways in which Appellants based their plan on the race of voters and candidates in order to ensure that black candidates would be elected or re-elected by black voters. In other words, Appellants' "*post hoc* rationalization" is in fact a lengthy and detailed admission of impermissible race-based districting. Based upon the overwhelming evidence that Appellants primarily were motivated by race in creating their plan, Appellants' appeal should be dismissed.

V. APPELLANTS HAD NO COMPELLING INTEREST FOR THEIR ADMITTED USE OF RACE IN DRAWING DISTRICT LINES

Appellants ironically attempt to justify their admitted use of race in drawing district lines by stating that they believed (erroneously) that they had to draw race-based lines in order to comply with the Voting Rights Act, and that this erroneous belief constituted a compelling interest that somehow sanitized their race-based districting plan. However, this Court's decisions in *Voinovich* and *Miller* show that this argument is fatally defective.

The District Court found in 1992 that in Ohio "[t]he totality of circumstances reveals coalitional voting between whites and blacks. As a result, black candidates have been repeatedly elected from districts with only a 35% black population." *Quilter v. Voinovich*, 1992 WL 677145 (N.D. Ohio Mar. 19, 1992). The District Court further found that "substantial coalitional voting between the races exists in Ohio, where white crossover

voting contributes to the election or reelection of all eleven of the black Ohio state legislators." *Id.* at *8. On appeal, this Court concurred that the evidence in this case fails to demonstrate "sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice." *Voinovich*, 113 S. Ct. at 1158.

Although Appellants concede this shortcoming in their argument, Jurisdictional Statement, p. 23, they assert that race-based line drawing was permissible because the Board feared lawsuits seeking to compel it to comply with the Voting Rights Act. *Id.* The issue, of course, is not whether a plaintiff could *file* a lawsuit against the Board, but whether such a plaintiff could *prevail*. As this Court has pointed out, a lawsuit against the Board for violations of the Voting Rights Act, as a matter of law, could not have succeeded. *Voinovich v. Quilter*, 113 S. Ct. at 1157-58. Accordingly, compliance with the Voting Rights Act is not a justification for Appellants' admitted use of race.

Faced with a similar argument, the *Miller* Court stated:

> "[W]e do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied. 'The history of racial classifications in this country suggests that *blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.*'
>
> * * *
>
> Georgia's drawing of the Eleventh District was not required under the [Voting Rights] Act because there was no reasonable basis to believe that Georgia's earlier enacted plans violated § 5."

Miller, 115 S. Ct. at ——. Accordingly, Appellants' attempt to create a compelling state interest in the conscious separation of voters by race should be rejected by this Court.

VI. THERE WAS NO PROCEDURAL BAR TO THE DISTRICT COURT'S DETERMINATION THAT APPELLANTS' PLAN IS UNCONSTITUTIONAL

In a final attempt to create a procedural bar to the review of their plan on its merits, Appellants argue that 28 U.S.C. § 1738 somehow requires the District Court to "defer" to the Ohio Supreme Court's judgment in *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992) (per curiam), even though *Ferguson* did not address the constitutionality of Appellants' plan. Under this same faulty logic, Appellants also assert that the District Court erred in failing to abstain from determining any state law issues in the course of this redistricting challenge. Appellants' arguments are without merit.

The inconsistencies in Appellants' *Ferguson* arguments highlight their flawed reasoning. For example, Appellants attempt to distance themselves from the "smoking guns"—Tilling's notes of his line-drawing process and the Board's Findings—by arguing that the notes and the Findings are "completely irrelevant," Jurisdictional Statement, p. 19, since they refer to a draft plan ("Amendment C"), rather than the plan finally adopted and currently at issue in this litigation ("Amendment D"). However, Appellants also argue that the District Court's consideration of Amendment D is foreclosed by *Ferguson, even though the Ferguson court only had before it and could only have ruled upon Amendment C.*[14]

Further, Appellants argue that Appellees lack standing to assert a claim of unconstitutional race-based districting, despite Appellants' admitted use of race in drawing district lines, because no Appellee resides in some of

[14] *Ferguson* was submitted on February 10, 1992 and decided on February 14, 1992, during the period that various drafts of the 1991 redistricting plan were being considered and modified by the Board. Amendment D was not adopted by the Board until February 18, 1992, four days *after* the *Ferguson* decision. Jurisdictional Statement, p. 19 n.18.

the unconstitutional voting districts. Appellants then turn around and argue that *Ferguson* somehow validated Appellants' plan in its entirety, even though the only districts represented by litigants in *Ferguson* were Senate District 32 (the only district whose validity actually was ruled upon) and the adjoining Senate District 22. *Ferguson*, 63 Ohio St. 3d at 198. Once again, Appellants cannot have it both ways.

Passing the inconsistencies in Appellants' various arguments, however, the fact remains that *Ferguson* did not limit the District Court's authority to address the constitutionality of Appellants' plan.

Appellees did not ask the District Court to review the Ohio Supreme Court's decision in *Ferguson* because the Ohio Supreme Court did not find in *Ferguson* that Appellants' plan meets the requirements of Article XI of the Ohio Constitution. In *Ferguson*, the Ohio Supreme Court held only that Senate District 32 meets the requirements of § 4 of Article XI of the Ohio Constitution. *Ferguson*, 63 Ohio St. 3d at 200 ("Plaintiffs and defendants and counterclaimants Henry and Drake raise the issue of the constitutionality of Senate District 32. . . . The court finds against the counterclaimants *on their claim* that the plan is unconstitutional . . .")

The concurring and dissenting Justices agreed that the only issue decided by the *Ferguson* Court was whether Senate District 32 meets the requirements of the Ohio Constitution. "[T]he only justiciable issue remaining in plaintiffs' amended complaint is the dispute regarding Senate District 32 and House District 68 and the inconsistency between Sections 3, 4, 8 and 11 of Article XI. . . . There is no other justiciable issue or controversy before us. . . . For the foregoing reasons, I conclude that Senator Henry's counterclaim challenging the constitutionality of Senate District 32 is not well taken." *Id.* at 201-02 (Moyer, J., concurring). "[T]he sole issue remaining in this case is whether the 1991 apportionment plan is con-

stitutional with respect to the composition of the 32nd Senate District." *Id.* at 212 (Douglas, J., concurring). The court "brushed aside all other issues" except "the one raised in Senator Henry's counterclaim." *Id.* at 215 (Resnick, J., dissenting).

Appellees do not challenge the Ohio Supreme Court's decision regarding the constitutionality of Senate District 32. Appellees raise a different issue—whether Amendment D as a whole meets the requirements of Article XI, § 7 of the Ohio Constitution (which it does not). The Ohio Supreme Court did not determine this issue, and, in fact, did not even discuss the application of § 7 in *Ferguson*. Moreover, the Ohio Supreme Court addressed the validity only of Senate District 32 in Amendment C. Amendment D, which is challenged by Appellees, was not in existence at the time the Ohio Supreme Court made its ruling. The Ohio Supreme Court, then, has not ruled, and could not have ruled, directly or indirectly, on the constitutionality of Appellants' plan.

Appellants' further arguments, that the District Court was compelled to abstain from consideration of the requirements of the Ohio Constitution in hearing Appellees' redistricting challenge, Jurisdictional Statement, pp. 24-28, are misplaced. As stated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976), "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule. 'The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" (citations omitted).

Growe v. Emison, 113 S. Ct. 1075 (1993), upon which Appellants primarily rely, is inapposite. *Growe* requires deference to ongoing parallel state court litigation in certain circumstances. *Id.* at 1077, 1080-83. However, *Ferguson* was neither parallel nor ongoing at the time of the proceedings in the District Court from which this appeal is taken. Rather, *Ferguson* concerned only the consti-

tutionality of Senate District 32 (a matter neither presented to nor considered by the District Court at any time), and *Ferguson* was concluded long before any of the decisions now appealed by Appellants were rendered by the District Court.

Appellants' remaining generalized reliance, in a footnote, upon the abstention doctrine articulated in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), Jurisdictional Statement, p. 27 n.21, also is unavailing. Since redistricting almost always involves consideration of state legislative (or, in Ohio, state constitutional) requirements, Appellants' application of *Burford* would effectively foreclose *any* federal court review in every case because it could always be said that state redistricting law and policies, and "[t]he entire electorate of the State . . . and all its elected representatives are potentially affected." *Id.* Appellants' abstention arguments are without merit, and their appeal should be dismissed.

CONCLUSION

For the reasons set forth above, Appellants' appeal should be dismissed, and the Opinions of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

[Filed Aug. 11, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5: 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

Judge Nathaniel R. Jones
Judge Anthony J. Celebrezze, Sr.
Judge David D. Dowd, Jr.

OPINION

The question before this court is whether the Ohio Apportionment Board's consideration of race in its 1992 redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. We hold that by virtue of demonstrated white and African American coalitional voting for legislative seats in Ohio, and the failure of Defendants to demonstrate a compelling state interest for using race as the predominant factor in drawing legislative lines, certain districts in the 1992 plan are unconstitutional.

I. Background and Procedural History

Pursuant to the Ohio Constitution, the State Apportionment Board, comprised of five members, must reapportion State House and Senate electoral districts for the state legislature every ten years.[1] Following the 1990 federal census, a majority of the Apportionment Board [2] appointed James R. Tilling to draft an apportionment plan on behalf of the Board. After conducting public hearings throughout the state, including meeting with some members of minority organizations, Tilling drafted a plan that included eight majority-minority districts, districts in which a majority of the population is a member of a specific minority group. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1153 (1993). On October 1, 1991, the Apportionment Board adopted the plan Tilling submitted by a 3-2 vote along party lines. *Id.* The three Republican members voted for the plan, and the two Democrats voted

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[1] Article XI, Section 1 of the Constitution of the State of Ohio provides:

> The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.
>
> Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year [1971] and every tenth year thereafter.

Ohio Const., art. XI, § 1.

[2] The majority consisted of Defendants George V. Voinovich, Governor of the State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Robert A. Taft, II, Secretary of State of Ohio. In the minority were Plaintiffs Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, and Thomas E. Ferguson, Auditor of the State of Ohio.

against it. The Board later reconvened on October 3, 1991, to make several technical amendments to the plan, and the plan, adopted on October 3, 1991, in the wake of these changes, was designated "Amendment C."

On November 1, 1991, Barney Quilter and Thomas Ferguson, the two Democrats on the Board who voted against the plan, and various Democratic party officials and legislators filed suit against the Republican members of the Apportionment Board and Tilling.[3] Seeking invalidation of the plan, the Plaintiffs alleged that the redistricting plan violated section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution, which provided specific apportionment guidelines. *Voinovich v. Quilter*, 794 F. Supp. 695, 695-96 (N.D. Ohio 1992). According to the Plaintiffs, the Defendants intentionally "packed minorities into certain districts where minorities historically were able to elect representatives of choice with crossover votes." *Id.* at 698. The Plaintiffs contended that this packing resulted in a waste of minority votes in the packed districts and a dilution of minority voting strength in the surrounding areas where the "packed" voters could influence elections. *Id.* In response, the Defendants contended that the plan actually enhanced the strength of black voters by creating safe, minority-dominated districts. As justification for these changes, the Defendants cited compliance with the Voting

[3] The dissent claims that the Plaintiffs commenced this litigation "to wrest control of Ohio's reapportionment process from the majority of the Board and place it with the federal court system." Dissenting Op. at [2]. Obviously, such a charge could be leveled against any entity that chooses to challenge a state's infringement of its federal statutory or constitutional rights because it is one of the means to bring such a challenge. Nevertheless, this was not the end or purpose for which the Plaintiffs filed their claim. The Plaintiffs sought a reapportionment plan that was not racially discriminatory, and in filing suit with the federal court, they were simply utilizing the best means to accomplish that end.

Rights Act and federal case law, which allegedly mandated the drawing of majority-minority districts. *Id.*

On January 31, 1992, a majority of this three judge panel held that there was "no legal mandate or finding of a Voting Rights Act violation to justify Defendants' creation of majority-minority districts wherever possible in the 1991 apportionment plan." *Id.* at 701. Thus, we ordered the Board to draft a new plan or demonstrate that it was remedying a section 2 violation.[4] *Id.* at 702.

The Apportionment Board responded by establishing and adopting a record on February 18, 1992, that, in its view, justified the Board's creation of minority-controlled state legislative districts. Furthermore at its February 18 meeting, the Board amended the 1991 plan to eliminate a series of technical errors in the plan that the Ohio Supreme Court had identified in its separate review of the plan, *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992). The resulting 1992 plan, "Amendment D," created only five majority-minority districts, however, a reduction from the eight majority-minority districts in the 1991 plan, "Amendment C."

On March 10, 1992, after the Board submitted its findings and conclusions, along with the new 1992 plan, this court held that the Board "fail[ed] once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992). Furthermore, this court held that the 1992 plan also violated the Fifteenth Amendment of the United States Constitution. *Id.*

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[4] We declined to address the Plaintiffs' constitutional claims at this point because our analysis under the Voting Rights Act required the plan to be justified or revised. Likewise, because the Ohio Supreme Court, in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992) (per curiam), was concurrently considering the Plaintiffs' claim under the Ohio Constitution, we abstained from addressing the pendant claim.

Nine days later, in response to Defendants' motion for a stay of the March 10 order pending appeal to the United States Supreme Court, this court additionally held that both the 1991 and 1992 plans violated the Fourteenth Amendment because they departed from the requirement that all districts be of nearly equal population. *Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 677145, at *10 (N.D. Ohio Mar. 19, 1992).

The Defendants appealed to the United States Supreme Court. In *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), the Supreme Court reversed this court's *Quilter* decisions. Denying two of the Plaintiffs' claims, the Court held that the reapportionment plan at issue did not violate section 2 of the Voting Rights Act, nor did it violate the Fifteenth Amendment to the United States Constitution. Nevertheless, the Court held that the Plaintiffs had established a *prima facie* case that the population deviations between the districts violated the Equal Protection Clause, and the Court remanded "only for further proceedings on whether the plan's deviation from equal population among districts violate[d] the Fourteenth Amendment." *Id.* at 1154.

Upon remand, we held that the Ohio reapportionment plan survived scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the Defendants advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts, (2) their plan reasonably furthered the rational state policy, and (3) the 13.81% and 10.54% total deviations fell within constitutional limits. *Quilter v. Voinovich*, 857 F. Supp. 579, 587 (N.D. Ohio 1994). Accordingly, judgment was entered for the Defendants on this issue.

While the latter decision was pending, however, the Plaintiffs moved this court for permission to amend their complaint in light of the Supreme Court's recent decision

in *Shaw v. Reno*, 113 S. Ct. 2816 (1993).[5] As a lower court, we are bound of course, regardless of the strength of our reservations,[6] to follow the Supreme Court's decision in *Reno*, where the Court held for the first time that a plaintiff could state a claim under the Equal Protection Clause by alleging that a districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 2828. We granted the Plaintiffs' motion,[7] and their complaint was

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[5] In dissent, our colleague argues that the Plaintiffs were actually bringing another vote dilution claim rather than a *Shaw v. Reno* claim. Dissenting Op. at [16]. Actually, however, this case is simply a classic example that the same set of facts or circumstances may give rise to more than one cause of action. The Supreme Court clearly denied the Plaintiffs' vote dilution claim under section 2 of the Voting Rights Act, but the Court did not address whether the Apportionment Board's use of race in redistricting, ostensibly as a remedial measure pursuant to the Voting Rights Act, violated the Equal Protection Clause of the Fourteenth Amendment. *See Quilter*, 113 S. Ct. at 1157. The Plaintiffs have brought the latter challenge in the instant case.

[6] We note that critics of the Court's decision in *Shaw* have raised compelling concerns with which we sympathize. *See* A. Leon Higginbotham, Jr., et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Review 1593 (1994); Brief of the Congressional Black Caucus as *Amicus Curiae* in Support of Appellants, *United States v. Hays*, Nos. 94-558/627, 1995 WL 382080 (U.S. June 29, 1995).

[7] In dissent, our colleague renews his disagreement with our prior decision to allow the Plaintiffs to amend their Complaint and bring a *Shaw v. Reno* challenge to the reapportionment plan. Dissenting Op. at [4-5]; Supp. Dissenting Op. at [2 n.3]. The dissent alleges that our decision violated the mandate rule by exceeding the scope of the remand, and he claims that review of a *Shaw* claim actually "required a new lawsuit and a new draw, with a probable different three-judge panel." *Id.*

In our prior decision, we clarified that "while a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Quilter v. Voinovich*, 157 F.R.D.

accordingly amended.[8] *Quilter v. Voinovich*, 157 F.R.D. 36, 40 (N.D. Ohio 1994).

36, 38-39 (N.D. Ohio 1994) (quoting *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (quotation omitted)). Under the mandate rule, we may not consider on remand the issues that the Supreme Court decided, but we may consider issues that have not been decided. *See id.* at 39 (citing *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.), *cert. denied*, 113 S. Ct. 125 (1992); *see id.* at 39 n.1 (citing cases from other circuits holding the same). In this case, the Supreme Court expressly abstained from considering the type of Equal Protection Clause challenge delineated in *Shaw*. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993). Thus, the Court's mandate did not prohibit us from considering the issue on remand.

To support the contention that the Plaintiffs' *Shaw* claim required a new lawsuit, new draw, etc., the dissent cites to some Local Rules that give direction with respect to the appropriate disposition of related cases that are filed separately. *See* Dissenting Op. at [5 n.2]; Supp. Dissenting Op. at [2 n.3]. Yet, these Local Rules would only apply if Plaintiffs had filed a new lawsuit alleging a *Shaw* claim. As such these Local Rules do not support the proposition that the Plaintiffs were "required to file a new lawsuit." Indeed, the dissent offers no supporting authority for this proposition, other than the case law cited in conjunction with the previous argument.

[8] The Plaintiffs' Second Amended Complaint revised the First Amended Complaint in only two respects. First, Count IV, entitled "Violation of the Equal Protection Clause—Segregation of Voters by Race Without Compelling Governmental Justification," is added. Second, the prayer for relief was accordingly revised. In pertinent part, Count IV alleges the following:

> 52. . . . The reapportionment plan adopted by the Defendants on February 18, 1992 intentionally separated Ohio voters on the basis of race without regard for the traditional redistricting principles set forth in the Ohio Constitution and otherwise without any compelling governmental justification. To justify the creation of race-based districts in the urban centers of Ohio, Defendants asserted that there was widespread racial bloc voting throughout Ohio. The trial court specifically found, and the Supreme Court of the United States confirmed, that Ohio did not suffer from legally cognizable racially polarized voting. . . .
>
> 53. The Defendants deliberately created race-based legislative districts in urban centers initially and then used the

Having considered the record evidence and the arguments of the parties, both written and oral, we are prepared to issue our decision.[9] We preface our findings of fact and conclusions of law, however, with a discussion of the governing law that provides the analytical paradigm for our conclusions.

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purported, but sham, necessity of creating such districts as the basis for ignoring the traditonal anti-gerrymandering provisions of the Ohio Constitution throughout the state of Ohio. Absent the ripple effect of the racial gerrymandering in the urban centers of the state of Ohio, the Defendants would not have been forced to ignore on a wholesale basis the directives of Article XI, Section 7, of the Ohio Constitution to follow existing political and legislative boundaries wherever possible.

54. . . . The decision to abandon the traditional districting mandates contained within the Ohio Constitution is neither compelled by the doctrine of federal supremacy, nor based on any lawful, organized, or rational districting criteria. . . .

55. The Defendants have articulated no compelling governmental interest for the wholesale abandonment of the provisions of the Ohio Constitution. As a result, the Defendants have drawn irregular districts in numerous places throughout the state, districts which have no explanation other than the ripple effects caused by the racially drawn districts in the urban centers. In some instances, the racially drawn districts themselves have irregular shapes not required by the Ohio Constitution.

56. The districts which have been modified solely on the basis of race include House Districts 31, 30, 22, 21, 38, 39, 44, and 49. No evidence has been presented to the trial court that either legally cognizable remedial action was necessary to draw these racially gerrymandered districts, or that the creation of such districts was narrowly tailored to further any compelling governmental need.

Pls. Second Am. Compl. ¶¶ 52-56.

[9] The court also appreciated and considered an *amicus* brief submitted by the United States Department of Justice, which supported the position of the Defendants.

II. First Principles

A. Nature of a Shaw v. Reno Claim

Prior to the Supreme Court's decision in *Reno*, the Court had delineated only two legal theories to support a redistricting challenge under the Equal Protection Clause of the Fourteenth Amendment: (1) violation of the "one-person-one-vote" principle, which requires that districts be equal in population so that the votes cast by voters in one district do not have less weight than those case by voters in other districts, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); and (2) a claim of vote dilution, whereby districts are purposefully drawn to unfairly dilute or diminish the voting strength of an identified group of voters, *Rodgers v. Lodge*, 458 U.S. 613 (1982). *Shaw v. Hunt*, 861 F. Supp. 408, 421 (E.D.N.C. 1994), *probable jurisdiction noted*, 63 U.S.L.W. 3916 (U.S. June 29, 1995) (No. 94-923); *see also Reno*, 113 S. Ct. at 2822, 2823, 2828; *Miller v. Johnson*, Nos. 94-631/797/929, 1995 WL 382020, at *23 (U.S. June 29, 1995) (Ginsburg, J., dissenting). In *Shaw v. Reno*, however, the Court announced a third means to challenge legislative redistricting under the Equal Protection Clause. The Court held that "a plaintiff challenging a reapportionment [plan] under the Equal Protection Clause may state a claim by alleging that the [plan], though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 113 S. Ct. at 2828; *Miller*, 1995 WL 382020, at *3. The Court defined such a deliberate and arbitrary distortion of district boundaries for racial purposes as a "racial gerrymander."[10] *Reno*, 113 S. Ct. at 2823.

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[10] The dissent does not find the Supreme Court's definition of racial gerrymandering "particularly enlightening in view of the apparent conflict of meaning between 'deliberate' and 'arbitrary' actions." Dissenting Op. at [17]. Evidently, the dissent has

The *Reno* Court reasoned that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Id.* at 2824 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), and they "may serve to stimulate our society's latent race-consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs," *United Jewish Organizations v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part). These observations were reiterated in the Court's recent decision in *Miller v. Johnson*:

> When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution."

1995 WL 382020, at *7 (citations omitted).

For these reasons, the Court has held that racial gerrymandering by state legislatures demands close judicial scrutiny; thus, a race-based redistricting plan can be upheld only if it is narrowly tailored to further a compelling state interest. *Reno*, 113 S. Ct. at 2825, 2826, 2830; *Miller*, 1995 WL 382020, at *3, *7, *13; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that strict

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never recognized that someone deliberately can act in an arbitrary manner.

scrutiny applies not only to legislation that contains explicit racial classifications but also to those "rare" statutes that are "unexplainable on grounds other than race," even though they are race-neutral on their face). Consistent with prior practice, the *Reno* Court made clear that because a racial gerrymander is a racial classification, it must be reviewed with strict scrutiny even if the drafters of the redistricting plan claim that the plan was drawn with the "benign" purpose of enhancing minority voting strength, 113 S. Ct. at 2830 ("Equal Protection Clause demands strict scrutiny of all racial classifications . . . because without it, a court cannot determine whether or not the discrimination truly is "benign."); *id.* at 2826 ("[D]istrict lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."), or claim that the racial gerrymander benefits or burdens the races equally, *id.* at 2829 (citing *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 1370 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree."); *see also Miller*, 1995 WL 382020, at *3 (noting that racial and ethnic distinctions of any sort are inherently suspect and require exacting judicial scrutiny regardless of the race of those burdened or benefited by the classification).

Although the Court in *Reno* clearly created a new means to challenge state apportionment plans pursuant to the Fourteenth Amendment, its analysis left many unanswered questions that are integral to the proper resolution of a *Shaw v. Reno* claim: (1) Is circumstantial evidence of "bizarre" district shapes necessary to state and sustain a *Shaw v. Reno* claim?; (2) To what extent must "race" be a factor in an apportionment plan before the plan becomes a racial gerrymander subject strict scrutiny analysis?; (3) Once strict scrutiny is triggered, who has the burden of proof in a *Reno* claim?; (4) What constitutes a "compelling state interest" that would justify

race-based redistricting?; and (5) What is the meaning of "narrowly tailored" in the redistricting context? Some of these questions were answered subsequently in the Court's *Miller* decision. We turn now to consider these issues.

B. Bizarre District Shapes: A Necessary Element?

Relying on *Reno*, the Defendants contend that strict scrutiny is not required in this case because "Plaintiffs have not established that any of the districts in [the 1992 plan] are " 'bizarre' or 'irregular.' " Defs.' Post Trial Br. at 55. This raises the question of whether the presence of bizarre district shapes is a necessary element or a threshold requirement to state a *Shaw v. Reno* claim.

Undeniably, the Court in *Reno* emphasized that the new cause of action under the Fourteenth Amendment was based on the presence of districts whose shapes were so irregular or bizarre that they rationally could not be understood as anything other than an effort to segregate voters on the basis of race. 113 S. Ct. at 2828, 2832. Such districts, however, do not draw close constitutional review simply because of their irregular shape. Adherence to traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, is not a constitutional requirement. *Id.* at 2827 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 & n.18 (1973)). Rather, bizarre-shaped districts demand strict scrutiny because their shape is circumstantial evidence that race has been a purposeful factor in their creation. *See Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) ("One need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation." (footnotes omitted)). Logically, therefore, the Supreme Court's use of a district's shape as circumstantial evidence of racial intent implies that proof can be made "by any means, including state concession,

bizarre shape, or some combination of the various factors typically used to prove the 'intent' element of an equal protection claim under *Arlington Heights*." *Hunt*, 861 F. Supp. at 431; *see Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

The validity of this reasoning was recently confirmed by the Court in *Miller*:

> Our observation in *Shaw* of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation. Nor was our conclusion in *Shaw* that in certain instances a district's appearance (or, to be more precise, its appearance in combination with certain demographic evidence) can give rise to an equal protection claim, 509 U.S., at —— (slip op., at 17), a holding that bizarreness was a threshold showing, as appellants believe it to be. Our circumspect approach and narrow holding in *Shaw* did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. The logical implication, as courts applying *Shaw* have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting.

1995 WL 382020, at *8. Thus, "parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold

showing of bizarreness" in order to state a valid *Shaw v. Reno* claim. *Miller*, 1995 WL 382020, at *9.

Now that we have discussed the types of evidence that a party can marshall to sustain a *Shaw v. Reno* claim, we turn to consider both the extent to which race must be a factor in an apportionment plan before the plan becomes a racial gerrymander subject to strict scrutiny and the party that bears that burden of proof.

C. The Trigger for Strict Scrutiny

The Court in *Reno* did not specify the threshold showing of racial consideration that was necessary to establish that a redistricting plan was a racial gerrymander requiring close judicial scrutiny. The Court did, however, narrow the spectrum by significantly reiterating the principle that "awareness" of race or "race consciousness" in the districting process is not equivalent to a racial gerrymander that requires strict scrutiny analysis:

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

113 S. Ct. at 2826 (emphasis in original).

In *Miller v. Johnson*, the Court clarified the burden of proof necessary to trigger strict scrutiny:

> Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed. . . . The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the *predominant factor* motivating the leg-

> islature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district had been gerrymandered on racial lines."

1995 WL 382020, at *10 (citations omitted and emphasis added).

Despite this clarification, there remains some ambiguity regarding the *Miller* "predominant factor" test. Specifically, what did the majority mean when it said that a plaintiff must prove that the legislature "subordinated" traditional districting principles to racial considerations in order to trigger strict scrutiny? Does this mean that a plaintiff must prove that the legislature disregarded or abandoned traditional districting principles in favor of racial considerations or does it mean that strict scrutiny will be triggered even if a state legislature follows traditional districting principles, simply because those principles were accorded less emphasis or less weight than racial considerations?

The ambiguity inherent in the *Miller* Court's predominant factor test is highlighted by the concurring opinion of Justice O'Connor and the dissenting opinion of Justice Ginsburg. Although no other justice joined her opinion, Justice O'Connor wrote separately to emphasize her understanding of the Court's predominant factor test:

> I understand the threshold standard the Court adopts—"that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,"—to be a demanding one. To invoke

> strict scrutiny, a plaintiff must show that the State has relied on race *in substantial disregard* of customary and traditional districting practices.

Miller, 1995 WL 382020, at *17 (O'Connor, J., concurring) (citation omitted and emphasis added). Justice Ginsburg in dissent, joined by Justices Stevens, Breyer, and Souter, interpreted the Court's new predominant factor test differently:

> Today the Court expands the judicial role, announcing that federal courts are to undertake searching review of any district with contours "predominantly motivated" by race: "strict scrutiny" will be triggered not only when traditional districting practices are *abandoned*, but also when those practices are *"subordinated to"—given less weight* than race. Applying this new "race-as-predominant-factor" standard, the Court invalidates Georgia's districting plan even though Georgia's Eleventh District, the focus of today's dispute, bears the imprint of familiar districting practices.

Id. at *21 (Ginsburg, J., dissenting) (citation omitted and emphasis added).

The majority, itself, recognized, as it had in *Shaw*, 113 S. Ct. at 2827, that a legislature's compliance with traditional districting principles may well suffice to defeat a claim of racial gerrymandering, but such a refutation was not possible in *Miller* because the Court found that the State of Georgia had subordinated those factors to racial objectives. *Miller*, 1995 WL 382020, at *12. As proof of subordination, the majority pointed to an objection of Georgia's Attorney General that was lodged with the Justice Department in response to the Justice Department's demand for three majority-black districts in Georgia. *Id.* The State Attorney General claimed that to comply with such a demand the State would have to " 'violate all reasonable standards of compactness and contiguity.' " *Id.* The Court found such a statement to

be "powerful evidence that the legislature subordinated traditional districting principles to race when it ultimately enacted a plan creating three majority black districts." *Id.* Nevertheless, a fair interpretation of this language does not lead to the conclusion that "subordination" can only be proven if a state abandons or violates traditional districting principles in favor of racial considerations. In fact, as Justice Ginsburg pointed out in dissent, Georgia's Eleventh District, which the majority held to be an example of "subordination," actually bore "the imprint of familiar districting practices." *Id.* at *21 (Ginsburg, J., dissenting); *id.* at *24-25 (Ginsburg, J., dissenting) (noting specifically how the Eleventh District's design reflects the significant consideration of traditional districting factors).

Moreover, the conclusion that "subordination" can only be proven if a state abandons or violates traditional districting principles in favor of racial considerations constitutes a logical fallacy. The presupposition of such a conclusion is that if districts are drawn on the basis of traditional districting principles—compactness, contiguity, etc., then such districts cannot be the result of racial gerrymandering. Such a conclusion is fallacious because it is certainly possible, both logically and factually, that districts could be crafted within the confines of traditional districting principles and still be predominantly motivated by racial considerations at the same time. Furthermore, to conclude otherwise accords a preclusive constitutional significance to a state's compliance with traditional districting principles, which exceeds the significance accorded by the Court. *See Reno*, 113 S. Ct. at 2816.

Taken together, all of this language leads us to conclude that a plaintiff may satisfy the predominant factor test and prove that traditional districting principles were subordinated to racial objectives not only when a state violates or abandons traditional districting principles in favor of racial motivations but also when a state substantially complies traditional districting principles and

gives them less weight in the apportionment process than racial considerations.

Although the Plaintiffs in this equal protection challenge bear the ultimate burden of persuasion throughout the proceeding, *see id.* at *10; *Batson v. Kentucky*, 476 U.S. 79, 93-94 & n.18 (1986); *Wygant*, 476 U.S. at 277-78, if the Plaintiffs offer proof substantiating that race was the predominant factor motivating the state's apportionment process, then this gives rise to a presumption that the plan is unconstitutional, and the burden shifts to the Defendants to demonstrate that their use of race was narrowly tailored to meet a compelling state interest, *see Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436. Yet, the Defendants' shifted burden is one of production only, not persuasion. The Plaintiffs still bear the ultimate burden of persuading the court that the Defendants did not have a compelling state interest that justified their use of race in apportionment process or that the Defendants' redistricting plan was not narrowly tailored to meet such an interest. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring); *Hunt*, 861 F. Supp. at 436.

D. Compelling State Interest

Next, we consider those reasons that might serve as a compelling state interest, justifying a state's decision to engage in race-based redistricting. At this point, we are not concerned with whether the Defendants in this case had a compelling justification for their consideration of race in the 1992 plan; we are concerned with whether the Defendants had a compelling justification for *any* redistricting plan that considered race as a predominant factor. The question of "whether the particular plan under challenge takes race into account to a greater degree than necessary to further a compelling state interest is a question for the 'narrowly tailored' prong of the strict scrutiny analysis, which examines the 'fit' between the compelling state interest and the precise means

chosen by the state to accomplish it." *Hunt*, 861 F. Supp. at 437 (citing *Wygant*, 476 U.S. at 280 & n.6, and *Fullilove*, 448 U.S. at 507 (Powell, J., concurring)). Without presenting an exhaustive review of those reasons that theoretically might serve as a compelling state interest in the redistricting context, we have chosen to limit our discussion to the compelling interest that the Defendants have offered in this case—compliance with section 2 of the Voting Rights Act. Defs.' Post Trial Br. at 57-63.

In *Shaw v. Reno*, the state argued that compliance with the Voting Rights Act was a compelling state interest. 113 S. Ct. at 2830. The Court, however, stopped short of totally endorsing this claim: "The states certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." *Id.*; *see Miller*, 1995 WL 382020, at *13. Obviously, the Court is aware that in strict scrutiny parlance a "compelling state interest" is a term of art. Thus, we do not think the Court's choice of the words "very strong interest" is insignificant. It suggests to us that the Voting Rights Act may serve as a compelling state interest in some circumstances, but in others, state action ostensibly in conformity therewith may violate the Equal Protection Clause of the Fourteenth Amendment. *See Miller*, 1995 WL 382020, at *13; *see also Johnson v. De Grandy*, 114 S. Ct. 2647, 2666-67 (1994) (Kennedy, J., concurring) ("Given our decision in *Shaw*, there is good reason for state and federal officials with responsibilities related to redistricting [that are engaging in remedial action pursuant to section 2 of the Voting Rights Act], as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause.").

Previously, the Court has recognized a state's compelling interest in taking race-based remedial measures to

eradicate the effects of past racial discrimination. *Miller*, 1995 WL 382020, at *13 (citing *Reno*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82)). Furthermore, the Court has recognized that this interest extends to remedying past or present violations of federal statutes that were intended to eliminate discrimination in specific aspects of life. *See Croson*, 488 U.S. at 500 ("constitutional or statutory violation"); *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring) ("violation of federal statutory or constitutional requirements"). Moreover, the Court has clarified that a state does not have to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277); *Miller*, 1995 WL 382020, at *13, *14; *Hunt*, 861 F. Supp. at 437.

Applying these principles to the redistricting context and the Voting Rights Act, the *Hunt* court developed a very useful standard by which to determine when the Voting Rights Act can serve as a compelling state interest:

> Under these principles, we think it clear that a state has a "compelling" interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a "strong basis in evidence" for concluding that such action is "necessary" to prevent its electoral districting scheme from violating the Voting Rights Act.
>
> . . . .
>
> A state has a "strong basis in evidence" for concluding that it must engage in race-based redistricting in order to comply with the Voting Rights Act when it has information sufficient to support a *prima facie* showing that its failure to do so would violate

> the Act. *See Croson*, 488 U.S. at 500 (majority) (evidence "approaching a prima facie case of a constitutional or statutory violation").

Hunt, 861 F. Supp. at 437-439; *see Johnson v. Miller*, 864 F. Supp. 1354, 1381 (S.D. Ga. 1994), *aff'd*, 1995 WL 382020 (U.S. June 29, 1995).

Generally, to establish a prima facie case that a single-member redistricting plan violates section 2 of the Voting Rights Act, a plaintiff must show three things, the *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))); *Johnson*, 864 F. Supp. at 1387; *Hunt*, 861 F. Supp. at 440. Thus, when a state has reliable information that indicates the relevant minority group could establish a prima facie challenge under section 2 of the Voting Rights Act to the existing districting plan, then it has a "strong basis in evidence" for concluding that it must engage in race-based redistricting to comply with section 2 of the Voting Rights Act, and it has established a "compelling interest" for the remedial measures. *Hunt*, 861 F. Supp. at 440.

E. Narrowly Tailored

Finally, we consider how to determine whether a racial gerrymander, if justified by a compelling state interest, is narrowly tailored to further that interest. The Court

provided little help with this issue in *Reno*, other than to say that in the context of a challenge under section 5 of the Voting Rights Act, "[a] reapportionment plan would not be narrowly tailored if the State went beyond what was reasonably necessary to avoid retrogression." Therefore, we agree with the *Hunt* court that the best analytical approach is to examine the Court's decisions that apply the narrowly tailored standard in other race-based remedial contexts. *See Hunt*, 861 F. Supp. at 444-45.

In other race-based contexts, the Court has examined five factors to determine whether a race-based affirmative action plan is narrowly tailored to serve the compelling state interest in remedying the discrimination: (1) the efficacy of alternative remedies that were less race-based or race-neutral; (2) whether the plan utilizes a fixed racial quota or a flexible racial goal; (3) the duration of the plan; (4) the relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates; and (5) the impact of the plan on the rights of third parties. *See United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (plurality); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 485-89 (1986) (Powell, J., concurring); *see also Croson*, 488 U.S. at 507-08; *Wygant*, 476 U.S. at 279-84. Although these criteria were developed in contexts other than race-based redistricting, we think they are easily adapted to this context. While we have engaged in a rigorous analysis, our inquiry has been careful and sensitive.

Considering the first factor, a court must decide whether the state could have accomplished its compelling interest by some means that were less race-based or race-neutral. *Wygant*, 476 U.S. at 280 n.6. If compliance with the Voting Rights Act is a state's compelling interest then, obviously, a race-neutral alternative does not exist. Assuming race must be considered to comply with the Voting Rights Act, the question then becomes whether

a state could have complied with the Voting Rights Act with means that were less race-based. The Plaintiffs in this case do not allege that the Apportionment Board created more majority-minority districts than is reasonably necessary to comply with the Voting Rights Act. Rather, they generally claim that the Board packed black voters into districts to comprise less than a majority, where a black minority population, in conjunction with significant white crossover votes, already had ample opportunity to elect the candidate of its choice without the addition of the black voters. This packing of black voters into districts where they were not needed allegedly resulted in a waste of black votes in the "packed" districts and a loss of minority "influence" in those districts where the black voters were previously located. Assuming *arguendo* that such race-based measures truly further compliance with section 2 of the Voting Rights Act, the analytical question becomes a two-fold concern: whether the 1992 plan creates more "packed" districts than is reasonably necessary to comply with the Act and whether the "packed" districts it creates contain substantially larger concentrations of minority voters than is reasonably necessary to give minority voters a realistic opportunity to elect representatives of their choice in those districts. *See Hunt*, 861 F. Supp. at 446.

Regarding the second factor, a court must determine whether the challenged plan requires a fixed racial quota that is crafted to achieve a racial balance or requires a flexible goal to be used as a standard in gauging the state's efforts at eradicating the discrimination in question. *See Sheet Metal Workers*, 478 U.S. at 477-78. We agree with the *Hunt* court that racial gerrymanders will "seldom be invalid on this ground" because they do not impose a fixed racial quota. 861 F. Supp. at 446. Even if a state creates a certain number of districts that are designed to elect minority representatives, there is no guarantee that minority representatives will be elected. Thus, such districts can hardly be viewed as anything

other than examples of an acceptable, flexible goal for minority representation. *See Sheet Metal Workers*, 478 U.S. at 487-88.

The third factor invokes consideration of the planned duration of the remedial measure. If it is not a temporary provision, it may last longer than reasonably necessary to eliminate the effects of the targeted discrimination. *See id.* at 479 (noting that a temporary race-based remedial measure is acceptable because it "will end as soon as . . . it is no longer needed to remedy past discrimination"). A race-based redistricting plan in Ohio will likely satisfy this test because the State is required, as a practical matter, to redistrict after each decennial census, and this will result in re-consideration and possible termination of the previous race-based plan.

The fourth factor requires the court to consider whether the remedial plan presents a reasonable relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates. As applied to the redistricting context, we think this requirement is satisfied so long as the percentage of racially-packed districts does not substantially exceed the percentage of minority voters throughout the state. *See Johnson v. De Grandy*, 114 S. Ct. at 2658 & n.11 (noting that ultimate right of section 2 of Voting Rights Act is minority voters' equal opportunity to elect candidate of their choice, as measured by proportionality between percentage of majority-minority voting districts in state to minority members' share of the relevant population throughout the state).

The fifth factor requires a court to consider whether the challenged plan "impose[s] an unacceptable burden on innocent third parties." *Paradise*, 480 U.S. at 182. As applied to the redistricting context, we agree with the *Hunt* court that "a race-based redistricting plan imposes an unacceptable burden upon third parties, [and] hence

is not sufficiently 'narrowly tailored' to survive constitutional muster, if it fails to comply with redistricting principles that are themselves constitutionally mandated, like the 'one person, one vote' standard and the prohibition against undue dilution of the voting strength of any identifiable group of voters." *Hunt*, 861 F. Supp. at 449. Like the *Hunt* court, however, we do not think that a racial gerrymander imposes an unacceptable burden on third parties simply because the redistricting plan has a bizarre shape or deviates from traditional districting principles, which, themselves, are not constitutionally mandated.[11] *Id.* at 449-56.

At this point we note that it is important for all the issues presented in this case to be analyzed in a way that gives expression to the constitutionally and statutorily based national goal of protecting the rights of persons victimized by historic discrimination, so that they may effectively participate in changing public policies to "ensure nondiscrimination and fair opportunities in education, employment, housing, and other areas." Arthur A. Baer & Pamela S. Karlan, *Voting Rights Act Enforcement: An Agenda for Equal Electoral Opportunity, in New Challenges, The Civil Rights Record of the Clinton Administration Mid-term* 169 (Report of the Citizen's Commission on Civil Rights, 1995). Court decisions of today must be mindful of the Supreme Court's admonition over one hundred years ago in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), that the right to vote is a "fundamental political right, because preservative of all

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[11] Consider the words of Chief Justice Warren Burger in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), where the Court considered and approved the use of race-sensitive remedies to combat segregated schools. "The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations; and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system." *Id.* at 28.

rights." The issue presented in this case must not be responded to in such a way as to gut the Voting Rights Act's promise of equal electoral opportunity. When minority voters are deliberately and purposefully packed into a district where they are unnecessary to the election of the minority's candidate of choice, who is capable of "changing public policies," such a plan must be justified by a compelling governmental purpose. This is particularly true when the effect of such a scheme is likely to be to reduce the opportunity for minority voters to coalesce with other voters to influence the election of candidates of their choice in the districts from which they are drawn. When this occurs the very spirit of the Voting Rights Act is eroded. The risk has prompted us to reject portions of the 1992 plan at issue here.

III. Findings of Fact and Conclusions of Law

Based on our review of the evidence submitted by both parties, we find, for the following reasons, that racial considerations were the predominant factor in the Defendants' 1992 reapportionment plan:

1. The Plaintiffs' claims of racial gerrymandering are somewhat unusual in this case. First, they allege that the Defendants drew race-based legislative districts in the urban areas of Ohio and that this decision had the ripple effect of causing irregular shaped districts throughout the State, which violated the traditional districting principles embodied in the Ohio Constitution, particularly Article XI, § 7. Pls.' Second Am. Compl. ¶ 55. In addition, the Plaintiffs alleged that some of the race-based districts, themselves, had irregular shapes in violation of the traditional districting principles contained in the Ohio Constitution. *Id.* Finally, the Plaintiffs alleged that the racially gerrymandered districts "included" House districts 31, 30, 22, 21, 38, 39, 44, and 49. *Id.* ¶ 56. The Defendants contend that the Plaintiffs are limited to challenging only these eight districts,

which were identified in their complaint. The Defendants, however, mischaracterize the Plaintiffs' complaint. The word "included" clearly is not an exclusive term. Thus, the eight districts identified in the complaint were illustrative of the alleged race-based districts but not necessarily an exclusive listing of them. That said, however, we note that we are not concerned with districts whose irregular shape may have been the ripple effect of another district that was racially gerrymandered. Such an irregular district may indeed violate proscriptions of the Ohio Constitution, but the focus of a *Shaw v. Reno* claim is racial gerrymandering in violation of the Fourteenth Amendment to the United States Constitution. Thus, we are only concerned in this case with districts that allegedly have been racially gerrymandered.

2. The Defendants admittedly considered race when drafting their 1992 apportionment plan. The Apportionment Board instructed Tilling to "draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act," and Tilling attempted to comply. Hr'g Tr. at 208. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act. *Id.* at 308.

3. Before Tilling drafted an apportionment plan, he attended public hearings throughout the state. At these hearings the Apportionment Board heard testimony from some members of the minority community requesting the Board to enhance minority voting strength by creating more majority-minority districts. Defendants' Post-Trial Br. at 2-3. At these hearings, Tilling publicly stated that consideration of and compliance with the Voting Rights Act was an important principle guiding the apportionment process. *Id.* at 3-5.

4. The Apportionment Board's Findings and Conclusions, adopted on February 18, 1992,[12] in support of the 1992 plan, reveal not only that race was a substantial and motivating factor in the reapportionment process but that it was the predominant factor in certain house districts. Based on the conclusions that the Voting Rights Act protected classes of voters, not incumbents, *see, e.g.*, Bd. Findings ¶¶ 177, 183, and that racial bloc voting existed throughout the State of Ohio, including districts containing minority voters, *id.* ¶¶ 124, 167, the Apportionment Board decided that it needed to create districts that would contain sufficient black population to guarantee the election of any new (non-incumbent) black candidate. Thus, the Board through Tilling added black voters to minority districts outside of Cuyahoga County because "there [wa]s insufficient black population in the minority districts to guarantee the election of a black candidate particularly given levels of voter turnout and racial bloc voting in the district." *Id.* ¶ 168. Obviously, one of the working assumptions in this process was that black voters would choose only a black candidate as their representative. This is clearly one of the demeaning and offensive assumptions that the Supreme Court has previously criticized as an impermissible racial stereotype. *See Miller*, 1995 WL 38220, at *7 (citing *Reno*, 113 S. Ct. at 2827).

5. The Board's analysis of incumbency elections in minority districts for 1984, 1986, 1988, and 1990, revealed an incumbency advantage of six to ten percent, *id.* ¶ 171, 173, and the Board concluded that it was unreasonable to configure districts based on

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[12] The Apportionment Board has not met since February 18, 1992, either to change or modify its findings regarding the 1992 plan. Thus, these findings constitute direct evidence of the Apportionment Board's rationale and justification for the 1992 plan.

the current incumbent because the successful incumbents might retire, die, or move on to other political positions during the 90's, *id.* at 172. *See also* Bd. Conclusion of Law ¶ 9 ("It is unreasonable to reconfigure minority districts based on the electoral success of minority incumbents. Further, such reconfiguration will result in impermissible minority vote dilution. Consideration of factors such as racial bloc voting, voter turnout, population shifts, demographics, incumbency factors, voting patterns and other such factors require that minority districts outside Cuyahoga County must reflect increased relative percentages of black voting age population.") Accordingly, the Board determined that "unless Black Voting Age Population margins are adopted in minority districts, minorities risk losing minority districts." Bd. Findings ¶ 174.

6. In Franklin County, the Board drew district lines to enhance the possibility of electing a new black candidate. Board Finding 189 indicates that Tilling "reconfigured House districts 29 and 31 in Franklin County to protect minority voters in those districts and to create a minority Senate District in Franklin County where none previously existed." *Id.* ¶ 189. Tilling testified that the incumbent black legislators, Reps. Miller and Beatty, had indicated a desire to run for different offices, and because the Voting Rights Act protects classes of voters and not incumbents, black voters were added to the districts of Reps. Miller and Beatty to achieve this goal. *Id.* ¶ 189. The percentage of black population in Rep. Miller's district, H.D. 22 under the 1992 plan, was increased from 38.50% to 44.68% (40.98% black voting age population), a 6.18% increase, which is within the 6-10% standard that would be necessary to compensate for the possible loss of incumbency advantage. Defs.' Supp. Exs., Vol I, Ex. DD. Likewise, the black population in Rep. Beatty's district, H.D. 21

under the 1992 plan, was increased from 46.80% to 54.30% (48.30% black voting age population), an increase of 7.50%. *Id.* Both Miller and Beatty previously had been elected to six and seven terms, respectively, Bd. Findings ¶ 162, by pluralities of better than two-to-one.

7. In Lucas County, the Board drew lines to enhance the possibility of electing a new black candidate. Tilling stated that he drew the districts in Lucas County "to protect a class of voters, not the particular incumbent in that situation." *Id.* ¶ 177. Tilling added additional minority votes to Rep. Casey Jones' district, H.D. 49 under the 1992 plan, "not because Casey Jones needed them but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candidate of their choice." *Id.* Moreover, Tilling accepted the rationale of increasing minority voters in Casey Jones district because the growth of the University of Toledo had displaced a number of individuals, causing some shift of population in his district, and because Jones might be nearing retirement age. *Id.* ¶ 195. The black population in Jones' district was increased from 41.70% to 49.99% (46.42% black voting age population), an increase of 8.29%. Defs.' Supp. Exs., Vol I, Ex. DD.

8. In Summit County, the Board drew lines to enhance the possibility of electing new black candidates. Based on the conclusion that Rep. Vernon Sykes' district, H.D. 44 under the 1992 plan, was "losing black population and to avoid minority vote dilution," Bd. Findings ¶ 194, the Board increased the black population in Sykes' district from 35.40% to 43.07% (39.86% black voting age population), an increase of 7.67%, Defs.' Supp. Exs., Vol I, Ex. DD. Previously Sykes had been elected to five terms by margins of two-to-one. Bd. Findings ¶ 162.

9. In Montgomery County, the Board drew lines to guarantee the election of new black candidates. Again, based on "population shifts" and the desire to "avoid dilution of minority voting," the Board increased the black population in Rep. McLin's and Rep. Roberts' districts, H.D. 38 and H.D. 39, respectively under the 1992 plan. *Id.* ¶ 193. The black population in McLin's district was increased from 42.10% to 44.47% (41.56% black voting age population), an increase of 2.30% and the black population in Roberts' district was increased from 36.10% to 40.69% (36.71% black voting age population), an increase of 4.59%. Defs.' Supp. Exs., Vol. I, Ex. DD.

10. In Hamilton County, the Board drew lines to enhance the possibility of electing new black candidates.

The Board found the following:

> Mr. Tilling, in drafting the 1991 Apportionment Plan, also determined that the Voting Rights Act protected classes of voters not incumbents. Since Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 [H.D. 31 in the 1992 plan] to increase the relative percentage of black population in that district in order to provide an opportunity for a new black candidate, without the benefit of incumbency, to be elected in the district.

Bd. Findings ¶ 183. Accordingly, the Board increased the black population in Mallory's district from 45.90% to 49.16% (43.13% black voting age population), an increase of 3.26%. Defs.' Supp. Exs., Vol. I, Ex. DD. The Board also increased the black population in Rep. Rankin's district, H.D. 30 in the 1992 plan, from 53.20% to 55.98% (52.72% black voting age population), an increase of 2.78%

in a district that was already a majority-minority district. *Id.* The Board increased the black population in Rankin's district allegedly because "[a] new black candidate would require a district with increased black population to be successful." Bd. Findings ¶ 186.

11. In addition to the Apportionment Board's Findings and Conclusions, Tilling, who was the principal architect of the apportionment plan, kept handwritten notes that indicated his procedure and his predominant use of race in drawing the original apportionment plan. *See* Pls.' Ex. Prior Proceeding B, No. 120. The notes revealed that in his first five steps Tilling calculated the ideal population size of the Senate and House districts, pursuant to Article XI, Section 2 of the Ohio Constitution, and determined those counties that had populations within five percent of the ideal in accordance with Article XI, Section 10 of the Ohio Constitution. Beginning with step six and continuing with each urban county thereafter, the notes repeatedly indicate that Tilling displayed the minority population of each urban county on his computer screen and then drew the "minority districts" first before proceeding. This process and the heightened attention to racial composition was confirmed at the hearing when Tilling testified concerning the maps of the urban districts drawn in accordance with the process contained in the notes. Hr'g Tr. at 344-51. Viewed sequentially, the maps indicated that for each urban county, the minority population was displayed; the most heavily black districts were drawn first; and each succeeding district that was drawn contained a decreasing percentage of black population. The Plaintiffs claim that the maps in conjunction with the notes establish that race was "the predominant concern of Mr. Tilling and the Board." Pls.' Post Trial Br. at 14. The Defendants

contend that Tilling's notes and the corresponding maps are irrelevant because they refer to the original "model" plan that Tilling submitted to the Board on September 26, 1991. Although it is true that this exact plan was never in effect and was modified on numerous occasions, we still find it probative of the Defendants' predominant consideration of race in the redistricting process. The fact remains that a not-too-distant forerunning of the 1992 plan was drawn in the aforementioned manner, and the Defendants do not contend that the 1992 plan totally discarded the procedure and results of the original plan.[18]

12. At this point we note that for purposes of this case, we assume without holding that the Apportionment Board substantially complied with the traditional districting principles mandated in Article XI of the Ohio Constitution. Based on our earlier analysis of the *Miller* Court's predominant factor test, *see supra* part II.C., we find it unnecessary to specifically address whether the Defendants complied with the traditional districting principles contained in the Ohio Constitution because even if a state substantially adheres to traditional districting principles, a plaintiff can still prove that racial objectives were the predominant factor in the apportionment process if tra-

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[13] Originally, the dissent agreed that the notes of Tilling "strongly suggest[ed] that he purposefully considered race when he drew the house district boundaries in Amendment D" and that this evidence of race-based action should trigger strict scrutiny. Dissenting Op. at [17 n.9]; *see also* Dissenting Op. App. A. ¶¶ 21, 23, 30, 38, 45, 53, 60, 68, and 75. In light of the Supreme Court's adoption of the predominant factor test in *Miller*, however, the dissent has changed its position and decided that Tilling's notes are not sufficient to trigger strict scrutiny. Supp. Dissenting Op. at [5 & n.4]. Nevertheless, the dissent continues to ignore totally the better and more complete direct evidence of the Board's race-based redistricting that was contained in the Board's Findings and Conclusions, which were adopted specifically in support of the 1992 plan. *See supra* part III., ¶¶ 4-10.

ditional districting principles were subordinated to—given less weight than—racial considerations. *See Miller*, 1995 WL 382020, at *10; *id.* at *21 (Ginsburg, J., dissenting). Nevertheless, we note that the Board's compliance with the traditional districting principles in the Ohio Constitution is a hotly contested matter, *see* Pls.' Post-Hr'g Br. at 36-49, on which we have previously chosen to abstain, *see Quilter*, 794 F. Supp. at 702.[14]

13. Based on our thorough review and consideration of all the evidence presented in this case, we find that race was the predominant motivating factor in the Defendants' creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan because traditional districting principles were subordinated to or given less weight in the reapportionment process than racial considerations. These House districts are the result of racial gerrymandering. Although none

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[14] Were we to decide to consider this issue, however, we note that as a preliminary matter we would have to decide whether this court was precluded from addressing the constitutionality of the 1992 plan under Article XI of the Ohio Constitution because of the Ohio Supreme Court's previous decision in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992) (per curiam). Ultimately, under the Ohio Constitution, the Ohio Supreme Court held the following: "The court finds against the counterclaimants on their claim that the plan is unconstitutional and, accordingly, we find the plan to be constitutional." *Id.* at 1022. Nevertheless, careful examination of the per curiam opinion reveals that the court was specifically addressing the constitutionality of Senate district 32 under sections 4, 9, and 11 of Article XI of the Ohio Constitution. Thus, Plaintiffs in the instant case argued before this court that the Ohio Supreme Court did not rule on the constitutionality of the challenged house districts under sections 7 and 10 of Article XI of the Ohio Constitution and that this court, accordingly, was not precluded from addressing the issue. The Defendants, however, have argued that this court is precluded from addressing the constitutionality of the reapportionment plan under the Ohio Constitution because the Ohio Supreme Court specifically stated that "the plan" was constitutional, meaning the whole plan.

of these districts presents a bizarre shape, both direct evidence from trial testimony and the Apportionment Board's Findings and Conclusions, and circumstantial evidence from Tilling's notes and accompanying maps, clearly reveal that the Defendants intentionally crafted these eight districts with the predominant purpose of separating voters on the basis of race.

14. Because race was the predominant motivating factor in the drafting of these eight districts in the 1992 plan, they must be subjected to strict scrutiny analysis. *Miller*, 1995 WL 382020, at *13. Thus, the burden of production shifts to the Defendants to show that House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan were narrowly tailored to meet a compelling state interest. *See id.; Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436.

15. The Defendants claim that compliance with section 2 of the Voting Rights Act was the compelling state interest that justified their race-based redistricting. Defs.' Post Trial Br. at 57-63.

16. The Defendants agree that in order to show that section 2 of the Voting Rights Act was a compelling state interest, they must have a strong basis in evidence that race-based redistricting was necessary as a remedial measure to comply with the Voting Rights Act. *Id.* at 59-60. Moreover, the Defendants agree that a state has a "strong basis in evidence" to conclude that it needs to engage in race-based redistricting to comply with section 2 of the Voting Rights Act when the state has information that is reasonably sufficient to lead it to conclude that the relevant minority group could make out a prima facie section 2 challenge to the existing plan. *Id.* at 59, 60, 63.

17. As we noted earlier, a plaintiff can establish a prima facie case of a violation of section 2 of the Voting Rights Act by providing evidence that satisfies the three *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))).

18. Assuming without holding that the Defendants possessed information that would lead them to reasonably conclude that a plaintiff could satisfy the first two *Gingles* factors, we hold that the Defendants did not have a "strong basis in evidence" to engage in race-based redistricting in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan because they did not possess information that would reasonably lead them to conclude that a plaintiff could satisfy the third *Gingles* factor in these districts—the presence of racial bloc voting.

19. Both this court and the Supreme Court previously held on the basis of all the evidence, that racially polarized voting generally did not exist in Ohio's legislative elections. The Court noted the following:

> [A]ppellees [Plaintiffs in this case] have failed to demonstrate *Gingles*' third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that Ohio does not suffer from "racially polarized voting." 794 F. Supp. at 700-01. Accord, App. to Juris. Statement 132a-134a, and n.2, 139a-140a. Even appellees agree. *See* Tr. of

> Oral Arg. 25. Here, as in *Gingles*, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles*, 478 U.S. at 49 n.15, 106 S. Ct. at 2766 n.15.

Quilter, 113 S. Ct. at 1158; *see also Quilter*, 1992 WL 677145, at *4 & n.2, n.3, *8 (holding that Ohio has coalitional voting, where whites cross over and vote for black candidates, and not polarized voting, where whites vote for white candidates and blacks vote for black candidates). By relying on these precedents, we are not saying that the Apportionment Board could not take race into account unless and until it had been proven in a court that a violation of section 2 of the Voting Rights Act had occurred. As we noted earlier, a state is not required to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277); *Miller*, 1995 WL 382020, at *13, *14. Our point in noting the previous rulings of this court and the Supreme Court regarding the absence of polarized voting in Ohio was to emphasize that what was readily and reasonably apparent to and held by the courts, also should have been reasonably apparent to the Defendants—racially polarized voting generally does not exist in Ohio's legislative elections.[15]

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[15] We note, however, one exception. In *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), the district court held that the two House districts, 52 and 53, under the 1981 redistricting plan, which were located in Mahoning County, violated section 2 of the Voting Rights Act. The court found under a totality of the circumstances analysis that racially polarized voting existed in these two districts.

20. The Defendants contend that Tilling reasonably concluded that "racial bloc voting existed throughout Ohio." Defs.' Post Trial Br. at 62 & n. 45. Yet, the bivariate regression analysis of the Plaintiffs' expert, Dr. Henderson, for the election years 1990, 1986, and 1984, revealed the presence of coalitional voting in each of the eight districts where the Defendants, through Tilling, chose to engage in race-based redistricting in the 1992 plan. *See Quilter*, 1992 WL 677145, at *4 & n.2. The percentage of white cross-over vote in each of those districts was as follows: Rep. Mallory—50.66%; Rep. Rankin—50.93%; Rep. Miller—44.50%; Rep. Beatty—50.25%; Rep. McLin—35.44%; Rep. Roberts—45.98%; Rep. Sykes—48.76%; Rep. Jones—44.46%. *Id.* at *4 n.2. Prior to the time that the Defendants adopted "Amendment D," the 1992 plan, their own expert, Dr. King, analyzed over 200 elections throughout Ohio, and he concluded that a "degree of racially polarized voting existed in Ohio," but he was not willing to characterize the degree of racial polarization as "legally significant." Defs.' Post Trial Br. at 63 & n. 47. Regardless of Dr. King's ability to comment on the "legal" significance of his analyses, the fact remains that Dr. King did not challenge Dr. Henderson's results on this point. *See Quilter*, 1992 WL 677145, at *4 n.3. Dr. King's own results regarding polarized voting in Ohio revealed that on average 95% of blacks voted for black candidates and 56.7% of whites voted for black candidates, thereby confirming Dr. Henderson's results. *Id.* at *4 n.2. In the Apportionment Board's Findings and Conclusions, the Board even admitted the presence of white cross-over voting in the minority districts where race-based remedial measures were utilized. Bd. Findings ¶ 168. Given the overwhelming statistical evidence of coalitional voting in the challenged districts under the existing plan, and given the fact that the Defendants had this

information available to them before they adopted the 1992 plan, with its race-based remedial measures, we find that the Defendants could not reasonably conclude that the relevant minority group could establish a prima facie case of a violation of section 2 of the Voting Rights Act in the eight challenged districts. Significant evidence of white majority bloc voting in these Ohio legislative districts did not exist.

21. Because the Defendants did not possess a strong basis in evidence that they needed to engage in race-based redistricting to comply with section 2 of the Voting Rights, the Act does not provide a compelling state interest to justify the remedial action.[16] *See Miller*, 1995 WL 382020, at *13 ("As we sug-

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[16] The dissent concludes that the "State of Ohio . . . has the compelling state interest of complying with the Voting Rights Act." Dissenting Op. at [18]. As support for this holding, the dissent relies on the district court's decision in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), where the court held that the two house districts, 52 and 53, located in Mahoning county under the 1981 redistricting plan violated section 2 of the Voting Rights Act, the Fifteenth Amendment to the United States Constitution, and section 7(C) of Article XI of the Ohio Constitution. The dissent implies that our instant finding that section 2 of Voting Rights Act did not constitute a compelling state interest to justify the Board's racial gerrymandering in the eight challenged House districts, is somehow inconsistent with the court's decision in *Armour*. In actuality, the two decisions present no conflict. The finding of racially polarized voting and a Voting Rights Act violation in one county of Ohio, does not necessarily mean that such evidence will be found in every county of Ohio. The House districts in Mahoning County under the 1992 plan were not even challenged in the instant case. To engage in race-based redistricting so as to remedy potential violations of section 2 of the Voting Rights Act, the Board must analyze the voting patterns in each district under the previous plan to determine if prima facie evidence of a section 2 violation exists. If such evidence does not exist in a given district, then the Board cannot engage in race-based redistricting in that district simply because a Voting Rights Act violation previously was found in another district in a different part of the State.

gested in *Shaw*, compliance with federal antidiscrimination law cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."); *Hunt*, 861 F. Supp. at 440.

22. Because the Apportionment Board lacks a compelling state interest for its racial gerrymandering in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan,[17] we conclude that these districts violate

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[17] In dissent, our colleague concludes that the Apportionment Board did have another compelling interest that justified its racial gerrymandering: compliance with Article XI of the Ohio Constitution, which contains Ohio's mandate to utilize traditional districting principles in the redistricting process. Dissenting Op. at [18]. Obviously, such a conclusion is based on the presumption that the Board adhered to the traditional districting principles in the Ohio Constitution when it drafted the 1992 plan. Although the dissent finds that the Board did comply with the districting principles in the Ohio Constitution, as we noted earlier the latter conclusion is a hotly contested matter, *see* Pls.' Post-Hr'g Br. at 36-49, on which we have previously chosen to abstain, *see Quilter*, 794 F. Supp. at 702. Because the Defendants, themselves, did not chose to proffer such a compelling justification for their racial gerrymandering, we again find it unnecessary to address the specific issue whether the Board complied with the traditional districting principles in the Ohio Constitution when it drafted the 1992 plan. Nevertheless, we offer two observations regarding the broader issue whether, assuming without holding that the Board did comply with the Ohio Constitution, such compliance could serve as a compelling state interest that would justify the Board's racial gerrymandering in the 1992 plan.

First, no previous court has held that a state's interest in complying with its own constitution provides a *compelling* justification to engage in racial gerrymandering. The dissent cites case law, which holds that states do have a legitimate interest in complying with the traditional districting principles embodied in their state constitutions. Dissenting Op. at [18]. No court, however, has ever held in the context of an equal protection challenge and in the face of direct evidence of racial gerrymandering that a state's interest in complying with its traditional districting principles provided compelling justification to engage in racial gerrymandering. Even

the Equal Protection Clause of the Fourteenth Amendment. Based on our holding, we find it unnec-

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the Defendants, themselves, do not make such a claim. To be sure, the Defendants argued that the Apportionment Board's compliance with Article XI of the Ohio Constitution indicated that it did not engage in racial gerrymandering and that strict scrutiny accordingly was not required. *See* Defs.' Trial Br. at 6-14, 61-64; Defs.' Post Trial Br. at 45-56. Nevertheless, even the Defendants realized that if this court determined that strict scrutiny was triggered by evidence of racial gerrymandering, the Defendants' only viable compelling interest sufficient to justify such race-based redistricting would be the Board's interest in complying with the mandates of section 2 of the Voting Rights Act. Thus, the Defendants relied solely on the Voting Rights Act as compelling justification for their race-base redistricting, once such a condition was determined, and did not even proffer compliance with the Ohio Constitution as a compelling justification. *See* Defs.' Post Trial Br. at 56-63.

Second, the dissent's conclusion defies logical reasoning. Without reiterating the Fourteenth Amendment's aversion toward race-base classifications, suffice it to say that our earlier analysis of Supreme Court precedent revealed that a state's purposeful use of race can only survive strict scrutiny if it is remedial in nature and substantially supported by evidence of past racial discrimination. *See Reno*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82). For example, in the context of our discussion of the Voting Rights Act as a compelling state interest, we noted that compliance with Voting Rights Act could serve as a compelling justification to engage in race-based redistricting so long as substantial evidence was present to indicate the need for such remedial action. *See supra* part II.D. Compliance with the Voting Rights Act, which was promulgated as a remedial measure for racial discrimination in the voting context, will clearly require that the apportioning entity purposefully consider race. Obviously, compliance with the traditional districting principles in the Ohio Constitution does not qualify as such a compelling interest. The Apportionment Board did not have to purposefully consider race so as to remedy past racial discrimination in order to comply with the traditional districting principles in the Ohio Constitution. The traditional districting principles in Article XI were clearly designed with the purpose of eliminating all forms of bias from the redistricting process. *See* Ohio Const. art. XI. Thus, to conclude that the Board's interest in complying with these principles justified their racial gerrymandering is logically unsustainable.

essary to discuss whether the 1992 plan was narrowly tailored to further a compelling state interest.

IV. Conclusion

The Fourteenth and Fifteenth Amendments to the United States Constitution, and the Voting Rights Act of 1965 have been major vehicles for the empowerment of black Americans long denied the full enjoyment of their political rights. Over the years, various schemes and artifices have been designed to serve as impediments to the attainment of citizenship status by minorities. As Jusice Frankfurter, however, wrote for the Supreme Court in *Lane v. Wilson,* 307 U.S. 268, 275 (1939), "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Without characterizing the nature of the discrimination present here, we simply hold that Justice Frankfurter's admonition is equally applicable to the Equal Protection Clause of the Fourteenth Amendment. Using race as the predominant factor to draw lines to concentrate black voters in discrete legislative districts with the reciprocal effect of siphoning off and reducing their influence in other districts, without legally cognizable justification, is incompatible with the Constitution, as now interpreted by the Supreme Court. Accordingly, we direct the State Defendants to redraft House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan to comply with the aforementioned principles.

In placing reliance on this court's and the Supreme Court's holdings that racial bloc voting generally had not occurred in Ohio's legislative elections, we make no judgment as to the state of racial progress in other aspects of race relations in Ohio. The fact that black voters, however, in the various legislative districts, as shown by the record in this case, coalesce with white voters in significant enough numbers to elect candidates of their choice, who happened to be black, demonstrates a high

degree of maturity. In our view, this degree of voter maturity represents the essence and ultimate objective of the Voting Rights Act and the Constitution.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze, Sr.
ANTHONY J. CELEBREZZE, SR.
U.S. Circuit Judge

(3) (3)

Nos. 95-132, 95-378

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

Appeals from the United States District Court for the Northern District of Ohio

---

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR TO AFFIRM

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15 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	1
I. INTRODUCTION	1
II. THIS COURT HAS JURISDICTION OVER APPELLANTS' APPEAL IN 95-132, AND THE DISTRICT COURT WAS WITHOUT JURISDICTION, THEREFORE, TO ENTER ITS ORDERS OF AUGUST 11, 1995	3
III. THE DISTRICT COURT ERRED BY DECLARING FOUR DISTRICTS INVALID BECAUSE THE PLAINTIFFS FAILED TO ESTABLISH THAT ANY OF THEM SUFFERED A COGNIZABLE INJURY UNDER THE FOURTEENTH AMENDMENT WITH REGARD TO THOSE FOUR DISTRICTS	5
IV. THE DISTRICT COURT ERRED BY MISAPPLYING THIS COURT'S DECISION IN *MILLER v. JOHNSON*, AND BY CONCLUDING THAT RACE WAS THE PREDOMINANT MOTIVATING FACTOR IN THE DRAFTING OF DISTRICTS CONTAINED IN AMENDMENT D	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1975)	4
Coleman v. Miller, 307 U.S. 433 (1939)	6
Eisenstadt v. Baird, 405 U.S. 438 (1972)	7
Kennedy v. Sampson, 511 F.2d 430 (D.C.Cir. 1974)	6
Korioth v. Brisco, 523 F.2d 1271 (5th Cir. 1975)	6
Leopold v. O'Leary, 80 F.R.D. 99 (D.Haw. 1978)	6
Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985)	4
Miller v. Johnson, 115 S.Ct. 2475 (1995)	3, 7
Quilter v. Voinovich, 794 F.Supp. 695 (N.D.Ohio Jan. 31, 1992)	9
Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187 (1972)	4
United States v. Hays, 115 S.Ct. 2431 (1995)	5
Voinovich v. Quilter, 113 S.Ct. 1149 (1993)	2, 9, 10
White v. Regester, 412 U.S. 755 (1973)	4
United States Constitution	
Fourteenth Amendment	5
Statutes	
28 U.S.C. § 1253	2, 3, 4
Miscellaneous	
Ohio Const., Art. XI	8, 9

IN THE

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Appeals from the United States District Court for the Northern District of Ohio

---

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR TO AFFIRM

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION.

Appellants hereby submit this response to the Motions to Dismiss filed by Appellees both in case number 95-132 and in case number 95-378. There is a good deal of overlap between the issues in these cases, and consequently, Appellants submit a single response to the Motions to Dismiss in both cases.[1]

In their Motions to Dismiss, Appellees have failed to present the Court with any persuasive arguments that this appeal should either be dismissed or that this Court should affirm the rulings of the district court. Indeed,

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[1] For the Court's convenience, Appellants have listed the Questions Presented in both cases in the Appendix hereto.

Appellees' Motions to Dismiss further demonstrate that this Court should either summarily reverse the decisions of the district court or note probable jurisdiction and set the case for argument.[2]

The district court majority, in search of a rationale for its seemingly never-ending effort to invalidate Ohio's plan of apportionment for its General Assembly, has complicated this case by injecting a number of procedural and jurisdictional issues. The district court majority exceeded the scope of this Court's remand in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993), and otherwise abused its discretion by permitting Appellees to amend their complaint following remand and to retry this case on a theory completely at odds with the theory upon which they originally tried the case. Then, the district court majority twice vacated its opinion and issued a new one.[3] On each occasion, the district court majority's actions required the participation of a judge who had resigned from office effective three days after the issuance of the April 28, 1995, opinion. Furthermore, the district court was without jurisdiction to vacate its May 26, 1995, decision because a proper appeal from that decision was pending in this Court.[4]

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[2] Much of Appellees' argument seems to suggest that this case is before the Court on a petition for a writ of certiorari. See Motion to Dismiss (95-132) at 7-8; Motion to Dismiss (95-378) at 12-13. It hardly needs emphasis, but in view of the tone of many of Appellees' assertions, Appellants note that this case is before the Court on appeal pursuant to 28 U.S.C. § 1253. Indeed, this is the only appeal available on a matter of great importance both to the people of the State of Ohio and to the proper relationship between federal and state authority.

[3] On May 26, 1995, the district court majority vacated its April 28, 1995, opinion and issued a new opinion. On August 11, 1995, the district court majority vacated its May 26, 1995, opinion and issued yet another opinion.

[4] Appellees suggest that Appellants inconsistently fail to assert that their notice of appeal from the district court's decision of April 28, 1995, deprived that court of jurisdiction to vacate that opinion and issue a new opinion on May 26, 1995. Motion to

Stripped of procedural and jurisdictional complexities, what is clear from its actions on remand from this Court is that the district court majority was searching for a reason, *any reason,* to usurp the authority of the Ohio Apportionment Board to draw districts for the Ohio General Assembly. The evidence before the district court unequivocally established that race was not the predominant factor motivating Appellants' adoption of the districts contained in Amendment D. Appellees simply could not establish that Appellants disregarded traditional districting principles or even that Appellants "gave race more weight than" other factors when drawing the plan. Thus, under any interpretation of this Court's decision in *Miller v. Johnson,* 115 S.Ct. 2475 (1995), including the district court majority's erroneous interpretation of August 11, 1995, judgment should be entered for Appellants.

II. THIS COURT HAS JURISDICTION OVER APPELLANT'S APPEAL IN 95-132, AND THE DISTRICT COURT WAS WITHOUT JURISDICTION, THEREFORE, TO ENTER ITS ORDERS OF AUGUST 11, 1995.

Appellees have suggested that this Court lacks jurisdiction over Appellants' appeal in case number 95-132 because no judgment was entered in this case until August 11, 1995. This argument is without merit.

28 U.S.C. § 1253 provides:

> Except as provided by law, any party may appeal to the Supreme Court from *an order granting or denying,* after notice and hearing, *an interlocutory or permanent injunction* in any civil action, suit or

---

Dismiss (95-378) at 15 n.8. Appellants have previously advised this Court, however, that the district court majority's May 26, 1995, decision and its order vacating its April 28, 1995, decision were filed some five hours *prior* to Appellants' notice of appeal, also filed on May 26, 1995. Jurisdictional Statement (95-378) at 7. Accordingly, no appeal was pending at the time the district court vacated its April 28, 1995, decision.

> proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

(emphasis added). The district court's decisions of April 28, 1995, and May 26, 1995, directed Appellants to redraw eight Ohio House districts. App. (95-132) 39a ("Accordingly, we direct the State Defendants to redraft House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan to comply with the aforementioned principles."); App. (95-132) 127a (same). Both decisions, therefore, constitute injunctions which were immediately appealable to this Court. *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 306-09 (1975) (three-judge district court order that "directs" a party to take certain action is an injunction, and is, therefore, appealable to this Court pursuant to 28 U.S.C. § 1253). See also *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194-95 (1972); *White v. Regester*, 412 U.S. 755, 759-60 (1973). Accordingly, Appellees' assertion that Appellants' appeals from the April 28, 1995, and May 26, 1995, orders were premature is completely without merit.

Because Appellants properly invoked the appellate jurisdiction of this Court pursuant to 28 U.S.C. § 1253, the district court lacked jurisdiction to alter the status of this case before this Court, *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985), as the district court purported to do in its orders of August 11, 1995.

III. THE DISTRICT COURT ERRED BY DECLARING FOUR DISTRICTS INVALID BECAUSE THE PLAINTIFFS FAILED TO ESTABLISH THAT ANY OF THEM SUFFERED A COGNIZABLE INJURY UNDER THE FOURTEENTH AMENDMENT WITH REGARD TO THOSE FOUR DISTRICTS.

In their Motion to Dismiss or Affirm in case number 95-132, Appellees assert that, although none of them reside in four of the eight house districts declared invalid by the district court majority, they nevertheless have standing to challenge every district contained in Amendment D. In *United States v. Hays*, 115 S.Ct. 2431 (1995), however, this Court held that nonresidents of allegedly racially gerrymandered districts do not have standing under the Fourteenth Amendment to challenge the validity of those districts. 115 S.Ct. at 2436. This Court further ruled that residents of districts adjoining those alleged to have been racially gerrymandered do not have standing to attack an apportionment plan simply by alleging that the racial composition of the district in which they reside would have been different if the adjoining district had not been so gerrymandered. Nonresidents of allegedly racially gerrymandered districts simply have not suffered "a cognizable injury under the Fourteenth Amendment." 115 S.Ct. at 2437.

Despite this Court's clear holding in *Hays*, Appellees assert that because some of them reside in four of the eight districts, they have standing to challenge the entire plan. This assertion is without any support in this Court's decision in *Hays*. Under Appellees' view of *Hays*, a plaintiff challenging the Hamilton County (Cincinnati) house district in which he resides would also have standing to challenge a Cuyahoga County (Cleveland) house district, even though that district is located at the opposite end of the state, more than 240 miles away. *Hays*, in which this Court denied standing to residents of adjoining districts, cannot be interpreted as suggested by Appellees.

Appellees, analogizing Apportionment Board members to legislators, further assert that they have standing to challenge the entire plan of apportionment because two of the Plaintiffs, Ferguson and Quilter, were the minority members of the Board which adopted the plan. This assertion is nonsensical.

This Court has concluded that legislators "whose votes . . . have been overridden and virtually held for naught . . ." may have standing to challenge official acts which have the effect of nullifying their votes. *Coleman v. Miller*, 307 U.S. 433, 438 (1939). See also *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974) (A legislator alleging "an illegal nullification" of his vote has standing "to vindicate the effectiveness of his vote."). But neither this Court, nor any federal court, has ever held that a legislator in the minority has standing *as a legislator* to challenge legislative action by the majority. See *Leopold v. O'Leary*, 80 F.R.D. 99, 101 (D.Haw. 1978) ("A legislator has no special right to standing simply by virtue of that status.").

In the case at bar, Ferguson and Quilter allege no concrete injury as a result of the Apportionment Board's adoption of Amendment D. They do not reside in any of the challenged districts, and indeed, they no longer hold political office. Ferguson and Quilter's only asserted injury is that when Amendment D was adopted, they voted no.[5] Certainly, the mere casting of a dissenting vote is insufficient to confer standing upon a quasi-legislative official to challenge the action of the majority. *Korioth v. Brisco*, 523 F.2d 1271, 1278 (5th Cir. 1975) ("None of the cases has indicated that a legislator, simply by virtue of that status, has some special right to invoke judicial consideration of the validity of a statute passed over his objecting vote.") (footnote omitted). Conse-

[5] Under Appellees' view of standing, every bill passed by a federal state, or local legislative body would be subject to challenge by any legislator over whose dissenting vote the bill was passed.

quently, Appellees lacked standing to challenge four of the eight districts declared invalid by the district court majority.[6]

IV. THE DISTRICT COURT ERRED BY MISAPPLYING THIS COURT'S DECISION IN *MILLER v. JOHNSON*, AND BY CONCLUDING THAT RACE WAS THE PREDOMINANT MOTIVATING FACTOR IN THE DRAFTING OF DISTRICTS CONTAINED IN AMENDMENT D.

In their Motions to Dismiss or Affirm, Appellees urge this Court to affirm the district court majority's erroneous interpretation and application of this Court's decision in *Miller v. Johnson, supra.* Appellants submit that this Court's decision in *Miller* is clear and unambiguous; strict scrutiny is not required unless the plaintiffs establish that race was "the predominant factor motivating" the drawing of district lines. *Miller,* 115 S.Ct. at 2488. Plaintiffs cannot make this showing unless they prove that traditional districting principles were "subordinated . . . to racial considerations," 115 S.Ct. at 2488, *i.e.,* that state officials "relied on race in substantial disregard of customary and traditional districting practices." 115 at 2497 (O'Connor, J., concurring). In essence, Appellees invite this Court to reject its unambiguous holding in *Miller* and adopt a new standard.

Even if this Court were to accept Appellees' invitation and adopt the district court majority's new "more weight than" standard, it must conclude that on the evidence presented, the district court erroneously determined that race "was given more weight than" traditional districting

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[6] Appellees also asserted that Ferguson and Quilter have "*jus tertii* standing" to assert the rights of third parties who reside in the eight districts declared invalid by the district court. Ferguson and Quilter have not, however, suffered their own injury-in-fact and have no legal realtionship with those individuals whose rights they are purporting to assert. Accordingly, "*jus tertii* standing" is inapplicable. See *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

principles. Indeed, the very evidence cited by the district court unequivocally establishes that the Board did not give race more weight than other factors when it adopted Amendment D.

Tilling's handwritten notes confirm that race was *not* "the predominant motivating factor" in drawing the districts contained in *Amendment D*. As Tilling explained at trial, he created his "model" plan to determine how many majority-minority districts could be created so that he could use that plan as a benchmark to judge all plans submitted to the Board. D. 312 at 335. Under his "model" plan, Tilling created nine majority-minority districts, but Amendment D contains only five such districts. Furthermore, when Amendment D was adopted reducing the number of majority-minority districts to five, Tilling explained that the sole (and uncontradicted) reason for doing so was to comply with the provisions of Article XI of the Ohio Constitution.[7] Thus, the requirements of the Ohio Constitution were "given more weight than" race in drafting Amendment D.

Similarly, the Board's Findings and Conclusions establish that race was not given more weight than other factors in drafting a reapportionment plan for the Ohio General Assembly, but rather that race was considered as *a* factor.[8] When considered as a whole, they establish the

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[7] As explained by Tilling:

> That is only a result of recombining political subdivisions, and there's no other motivation whatsoever. But it points out, and I think you want to examine these numbers in real detail. It does illustrate what happens when you follow the Ohio Constitution, not the Voting Rights Act.

D. 147, Ex. B at 87.

[8] Contrary to Appellees' assertion, the Board's Findings and Conclusions were not adopted pursuant to the district court majority's command to "show justification for its use of race in drawing districts . . . ." Motion to Dismiss (95-132) at 4-5; Motion to Dismiss (95-378) at 9. Rather, the Board's Findings and Conclu-

Board's belief that its plan complied with *both* the traditional districting principles embodied in Article XI of the Ohio Constitution and the requirements of federal law. D. 147, Ex. A, Findings at ¶¶ 32, 34, 241-54, Conclusions at ¶¶ 7-8, 11-12. See *Voinovich*, 113 S.Ct. at 1158.[9] Thus, it is plain that race was *not* the predominant factor in the Board's reapportionment, and contrary to the district court's holding, race was not given more weight than traditional districting principles.[10] This Court

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sions were adopted following the district court majority's command *to show justification for the creation of majority-minority districts rather than a greater number of influence districts as demanded by Appellees. Quilter v. Voinovich*, 794 F.Supp. 695, 701-02 (N.D.Ohio Jan. 31, 1992). It is for this reason that the Findings and Conclusions go into great detail explaining the drawing of district lines in all urban counties and the effect of those lines on concentrations of minority population. It is completely disingenuous for Appellees to assert that this detailed explanation, which they demanded, establishes that race was given more weight than traditional districting principles.

When viewed in their entirety, however, the Board's Findings and Conclusions establish that race was simply one of many factors considered by the Board. This is apparently the reason the district court majority originally adopted its "substantial and motivating factor" standard in its unrelenting quest to invalidate Ohio's reapportionment plan.

[9] Even the district court acknowledged that "[t]he Apportionment Board instructed Tilling to 'draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act,' and Tilling attempted to comply. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act." App. (95-132) 28a (citations omitted); App. (95-132) 111a (citations omitted); App. (95-378) 29a.

[10] The district court majority also cites as evidence of racial gerrymandering the following increases in black voting age population in districts then represented by incumbent African-American legislators: (1) HD 21, +7.50%; (2) HD 22, +6.18%; (3) HD 30, +2.78%; (4) HD 31, +3.26%; (5) HD 38, +2.30%; (6) HD 39, +4.59%; (7) HD 44, +7.67%; and (8) HD 49, +8.29%. App. (95-378) 31a-35a. Appellants maintain that these minor increases in African-American voting age population do not support a finding

should, therefore, note probable jurisdiction and reverse the decision of the district court.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellants' Jurisdictional Statements in case numbers 95-132 and 95-378, filed on July 24, 1995, and September 8, 1995, respectively, this Court should either:

(a) summarily reverse the judgment below and remand for entry of judgment in Appellants' favor in accordance with the Court's opinion and mandate in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993); or

(b) note probable jurisdiction and reverse the decision of the district court.

Respectfully submitted,

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Dated: September 21, 1995

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that race was "the predominant motivating factor" in drawing the districts contained in Amendment D.

APPENDIX

APPENDIX

QUESTIONS PRESENTED

95-132:

1. Did the court below violate the terms of this Court's remand, or commit an abuse of discretion, when, following the remand, it granted plaintiffs' motion for leave to file an amended complaint and proceeded to adjudicate the new claim presented in that complaint?

2. Did the district court err in allowing this action to be maintained with respect to those electoral districts in which no plaintiff suffered any cognizable injury?

3. Was the district court's judgment erroneous (a) because it applied an incorrect standard of proof in determining that plaintiffs had made out a *prima facie* case and (b) because plaintiffs could not make out a *prima facie* case under the correct standard of proof?

4. If the district court did not err in holding that plaintiffs had made out a *prima facie* case requiring strict scrutiny of defendants' actions, did the court err in concluding that the defendants had failed to establish a compelling interest justifying those actions?

5. Did the district court err in considering the question whether defendants' actions violated the Ohio Constitution because (a) consideration of that question was barred by the full faith and credit statute, 28 U.S.C. § 1738, and (b) if consideration was not barred by that statute, the district court should have abstained under the principles laid down by this Court?

95-378:

1. Did the court below violate the terms of this Court's remand, or commit an abuse of discretion, when, following the remand, it granted plaintiffs' motion for leave to

file an amended complaint and proceeded to adjudicate the new claim presented in that complaint?

2. Was the district court divested of jurisdiction in this case once a proper notice of appeal was filed and perfected by the filing of a jurisdictional statement with this Court?

3. Did the district court err in allowing this action to be maintained with respect to those electoral districts in which no plaintiff suffered any cognizable injury?

4. Did the district court err by (a) ruling that a plaintiff may establish a *prima facie* case of racial gerrymandering without establishing that the state redistricting officials relied on race in substantial disregard of customary and traditional districting principles, and if not, (b) by ruling that, on the evidence before it, the defendants had given less weight to traditional districting principles than to racial considerations?

5. If the district court did not err in holding that plaintiffs had made out a *prima facie* case requiring strict scrutiny of defendants' actions, did the court err in concluding that the defendants had failed to establish a compelling interest justifying those actions?

S.L 23 PAGE 11

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No. 95-132

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WILLIAM MALLORY, Appellees.

APPELLEES' MEMORANDUM IN OPPOSITION TO APPELLANTS' MOTION TO DEFER CONSIDERATION OF JURISDICTIONAL STATEMENT

To the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

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No. 95-132

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APPELLEES' MEMORANDUM IN OPPOSITION TO APPELLANTS' MOTION TO DEFER CONSIDERATION OF JURISDICTIONAL STATEMENT

To the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

Appellants' Motion to Defer Consideration of Jurisdictional Statement must be denied. The Jurisdictional Statement for which Appellants request deferred consideration was improperly filed by Appellants, in the course of improvident appeals from Opinions of the District Court which were never entered as judgments, and which were subsequently vacated by the District Court. Deferring consideration of that Jurisdictional Statement -- particularly for the stated purpose of allowing it

to be considered along with a forthcoming Jurisdictional Statement in another appeal by Appellants -- creates three problems: (1) unnecessary delay in the inevitable recognition of the fact that the pending Jurisdictional Statement was and is improper; (2) unnecessary confusion about which of the District Court's actions Appellants properly can and actually do challenge by appeal; and (3) unnecessary confusion about the grounds on which Appellants purport to be proceeding.

By way of a brief background, on April 28, 1995, the majority of the three-judge panel in the District Court entered an Opinion in the action below. Appellants' Jurisdictional Statement, Appendix A. No judgment was then entered. Indeed, on May 9, 1995, the District Court issued a supplemental Order inviting the parties to submit proposed remedies, "preparatory to filing a Rule 54 Judgment Entry." Appellant's Jurisdictional Statement, Appendix B (emphasis added).

On May 26, 1995, despite the absence of any judgment, Appellants filed a premature and improper Notice of Appeal to this Court from the April 28 Opinion, and the May 9 Order of the District Court. Appellants' Jurisdictional Statement, Appendix H. However, also on May 26, 1995, and without reference to the premature appeal, the majority of the three-judge panel in the District Court issued an Order vacating their April 28 Opinion, Appellants' Jurisdictional Statement, Appendix F, and a new

Opinion was entered. Appellants' Jurisdictional Statement, Appendix C. Once again, no judgment was then entered.

On June 23, 1995, again despite the absence of any judgment, Appellants filed a Notice of Appeal to this Court from the May 26 Opinion of the District Court. Appellants' Jurisdictional Statement, Appendix I. On July 24, 1995, Appellants filed their Jurisdictional Statement regarding their appeal from the April 28 and May 26 Opinions, and the May 9 Order. It is this Jurisdictional Statement for which Appellants now request that consideration be deferred.

However, on August 11, 1995, the majority of the three-judge panel in the District Court issued an Order vacating the May 26 Opinion. Appellants' Supplement to Application to Stay Orders [etc.], Appendix A. As a result, judgment was never entered on either of the Opinions which are the subject of Appellants' pending Jurisdictional Statement, and both of those Opinions have now been vacated by the District Court. As noted above, the May 9 Order of the District Court, which is the only other possible subject of the pending Jurisdictional Statement, expressly indicated that it was preparatory to any judgment.1/

1/ On August 11, 1995, upon vacating the May 26 Opinion, the District Court entered another new Opinion. Appellants' Supplement to Application to Stay Orders [etc.], Appendix B. However this time, on the same day, the District Court also filed a separate Judgment, their first and only Judgment regarding the various matters currently appealed by Appellants, which Judgment directs Appellants to comply with (continued...)

Obviously, Appellants' pending Jurisdictional Statement does not relate to any current, viable, appealable action by the District Court. Although Appellants have appealed from the August 11, 1995 actions of the District Court, including the only Judgment recently entered below, there is no reason to defer consideration of the pending Jurisdictional Statement for purposes of considering it with some future jurisdictional statement relating to the matters recently appealed. The pending Jurisdictional Statement improperly concerns Opinions which were not entered as judgments and which the District Court has already set aside; accordingly, the pending Jurisdictional Statement should be recognized right now as being inappropriate, and the appeals which it supports should be dismissed.

1/ (...continued)
the August 11 Opinion. Appellants' Supplement to Application to Stay Orders [etc.], Appendix D.

On August 17, 1995, Appellants filed a Notice of Appeal to this Court from the various filings of the District Court on August 11, 1995, including, remarkably, an express appeal from a Supplemental Dissenting Opinion filed by the dissenting member of the three-judge panel, who would appear to support Appellants' position in this litigation. In any event, Appellants' August 17 Notice of Appeal does at least recite that an appeal is taken from the District Court's August 11, 1995 Judgment. See Appellants' Motion to Defer [etc.], Exhibit A.

For the foregoing reasons, Appellants' Motion to Defer Consideration of Jurisdictional Statement should be denied.

Respectfully submitted,

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No. 95-132

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GEORGE V. VOINOVICH, STANLEY J. ARONOFF, ROBERT A. TAFT, II, and JAMES R. TILLING, Appellants,

v.

BARNEY QUILTER, THOMAS E. FERGUSON, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, TYRONE RILEY, RICHARD CORDRAY, PAUL MECHLING, RONALD GERBERRY, MARY ABEL, and
WILLIAM MALLORY, Appellees.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5(b), the undersigned, a member of the Bar of this Court, hereby certifies that three true and accurate copies of Appellee' Memorandum in Opposition to Appellants' Motion to Defer Consideration of Jurisdictional Statement was class postage prepaid, upon the following this 8th day of September, 1995:

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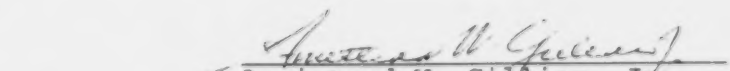

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